No. 08A332
Title: Jennifer Brunner, Ohio Secretary of State, Applicant
v.
Ohio Republican Party, et al

Docketed:
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (08-4322)

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 15 2008	Application (08A332) for stay, submitted to Justice Stevens.
Oct 16 2008	Motion for leave to file amicus brief filed by American Federation of Labor and Congress of Industrial Organizations, et al.
Oct 16 2008	Response to application from respondent Ohio Republican Party, et al. filed.
Oct 16 2008	Reply of applicant Jennifer Brunner, Ohio Secretary of State filed.
Oct 17 2008	Application (08A332) referred to the Court by Justice Stevens.
Oct 17 2008	Application (08A332) granted by the Court. Opinion per curiam.
Oct 17 2008	Motion for leave to file amicus brief filed by ACLU of Ohio, et al.

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No. 08A332

In The Supreme Court Of The United States

JENNIFER BRUNNER,
OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, *et al.*,
Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Ohio Secretary of State Jennifer Brunner ("Secretary") urgently asks this Court to restore order to Ohio's election, which was destabilized by a sharply divided en banc Sixth Circuit based on a flawed understanding of a simple provision of federal law.

In a suit filed just weeks before Election Day, Plaintiffs Ohio Republican Party, et al. ("ORP"), argued, among other things, that the Secretary's statewide voter registration database does not comply with the Help America Vote Act, 42 U.S.C. § 15481 *et seq.* ("HAVA"). That very database has been in place since 2004 without challenge by ORP. It was used in the 2006 general election and in the 2008 presidential primaries just last spring.

In a temporary restraining order ("TRO") hearing held less than a month before Election Day—and after in-person absentee voting in Ohio had already begun—the district court denied the Secretary's request to call witnesses who could explain how the complex database system works. Instead, without the benefit of testimony, the district court on Thursday, October 9, 2008, ordered the Secretary, in effect, to reprogram her database to the court's specifications by Friday, October 17. Last night the en banc Sixth Circuit affirmed the district court's TRO. As things now stand, the Secretary must reprogram the statewide voter registration database by Friday—after Ohioans have begun voting, and as she and the 88 county boards of elections are undertaking other efforts to ensure that the general election in Ohio will be a smooth one.

This Court should stay the TRO for two clear reasons. First, it is baseless. ORP has shown *no* likelihood of success on the merits, because ORP has no private right to enforce HAVA in a suit under 42 U.S.C. § 1983. This Court has explained that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002), and the HAVA provision at issue contains no such clear language. Thus, ORP never should have been allowed through the courthouse door on its HAVA claim in the first place. Now that is *has* been allowed in, a flood of lawsuits across the nation could follow from plaintiffs of either political party who will argue that HAVA entitles them to a federal court hearing on vague claims concerning state officials' administrative actions. Those lawsuits will interfere with other state election officials' efforts to administer smoothly the election and disrupt the careful federal-state balance that HAVA embodies. Congress intended no such result.

Second, the needs for a stay here are weighty. The Secretary and county boards of elections have vitally important jobs to do in preparing Ohio for this historic election. In close coordination with one another, they are taking numerous steps to verify the accuracy of the voter registration lists, to confirm voters' eligibility, and to prevent various forms of fraud in the election. If the TRO remains in place, mismatches may well be used at the county level unnecessarily to challenge fully qualified voters and severely disrupt the voting process.

What is more, the Secretary, in full acknowledgement of the district court's authority, is now undertaking her best efforts to comply with the TRO. The district

court's strict deadline, however, necessarily requires the Secretary to dedicate a large number of staff members' full attention to implementing the court's order, thereby diverting resources from the Secretary's regular (and critical) election-administration duties. Implementing the order is also highly challenging; it is not an easy task to accommodate the district court's requirements by altering a complex, four-year-old database that the current Secretary did not create and that interacts with 88 county databases and another state agency's database. This reprogramming also requires the Secretary to run extensive tests to ensure the accuracy of the information provided.

Moreover, even if the Secretary's diligent efforts to comply with the TRO were to succeed, the effects of the changes to the database are uncertain, to say the least. Having been denied the opportunity to call a single fact witness, the Secretary was never able meaningfully to explain to the district court the possible consequences of ORP's proposed changes. This Court has explained that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (per curiam). In light of "the imminence of the election and the inadequate time to resolve factual disputes," the district court here, as in *Purcell*, should have "allow[ed] the election to proceed without an injunction" altering the voter-registration database that has been in place for past statewide elections. *Id.* at 8; *see also id.* (Stevens, J., concurring) ("[T]he Court wisely takes action that will

enhance the likelihood that [constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation.").

Finally, even as the Secretary devotes enormous resources in an effort to comply with the TRO, looming over her is the threat of contempt if she fails to meet the district court's strict deadline tomorrow. And with the federal courts' doors now opened to private claimants asserting rights under HAVA's computerized registration list requirement, it is difficult to predict what additional lawsuits might follow, with additional threats of sanctions. Such litigation poses a substantial risk of undermining confidence in the electoral system.

The bottom line is therefore quite simple: The district court abused its discretion when, with no factual development, it entered a TRO that disrupted the electoral process in Ohio shortly before Election Day, and in a suit that could have been brought years ago and that was not proper in the first instance. An immediate stay is warranted.

STATEMENT OF THE CASE AND FACTS

Congress enacted HAVA in 2002 to require, among other things, that States adopt statewide computerized databases containing "the name and registration information of every legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A). The chief state election official must also enter an agreement with the state motor vehicle authority to match information to verify the accuracy of the information provided on applications for voter registration. *Id.* § 15483(a)(5)(B)(i).

To comply with HAVA, the Ohio Secretary of State implemented a system of interfacing computer databases that allows Ohio election officials to verify voter registration rolls. In June 2006, the then-Secretary programmed the database so that it did not provide notification to counties of certain mismatches. Under the then-Secretary's watch, this database system was used during the 2006 general election in Ohio. The current Secretary inherited that database when she took office in January 2007, and she used the database, unchanged, during the March 2008 presidential primary in Ohio.

On Friday, September 26, 2008—only four days before voting began in Ohio—the Ohio Republican Party ("ORP") sued the Secretary, seeking a temporary restraining order and injunctive relief. Compl., Dist. Ct. Dkt. No. 2. Among other things, ORP's complaint alleged that the Secretary "violate[d] both the letter and the spirit of HAVA," *id.* ¶ 48, by "failing to verify voter registration against [a statewide] computerized database." *Id.* ¶ 45. In the initial round of TRO briefing, ORP focused on closing the five-day window under Ohio law during which a voter was authorized to both register to vote and simultaneously submit an absentee ballot. The district court denied a TRO pertaining to this window, but it granted a TRO ordering the Secretary to permit election observers at all boards of elections and polling places during the absentee-voting period. TRO Order 1, Dist. Ct. Dkt. No. 27.

Both the Secretary and ORP filed emergency requests for relief with the Sixth Circuit, and the Sixth Circuit granted the Secretary's motion to stay the TRO.

Ohio Republican Party v. Brunner, Nos. 08-4242, 08-4243-08-4251, 2008 U.S. App. LEXIS 20677 (6th Cir. Sept. 30, 2008).

ORP then returned to the district court and filed a "Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal" on Sunday, October 5, 2008—six days after voting had begun. Renewed TRO Mot., Dist. Ct. Dkt. No. 36. That motion asked the district court to rule on ORP's HAVA claims. *Id.* at 1-2. The Secretary opposed the motion, Opp. to Renewed Mot. (Oct. 8, 2008), Dist. Ct. Dkt. No. 43, and asked for a hearing on the TRO request, noting that the "factual issues raised in the Plaintiffs' filing would be best addressed by means of a hearing" at which the Secretary could cross-examine ORP's affiants and explain the voter database. Secretary's Mot. for Hr'g at 1 (Oct. 8, 2008), Dist. Ct. Dkt. No. 42. The district court granted the motion for an oral hearing but denied the Secretary's request for an opportunity to cross-examine ORP's affiants and to present testimony concerning the statewide database. Order on Mot. for Hr'g (Oct. 8, 2008), Dist. Ct. Dkt. No. 47.

Following an oral hearing as well as an in-chambers conference to which the district court invited the media, the court again granted a TRO. Op. & Order ("TRO Order II"), Dist. Ct. Dkt. No. 52. The Order required the Secretary to provide "effective access" to voter mismatch information. *Id.* at 16.

The Secretary filed an emergency motion with the Sixth Circuit requesting the court to vacate or stay the district court's TRO. Secretary's Emergency Mot., 6th Cir. No. 08-4322 (Oct. 10, 2008). In response to the Secretary's motion, ORP

petitioned the Sixth Circuit for initial en banc review and filed a response brief. The Secretary, on the court's order, responded to the initial en banc petition, but time did not allow the filing of a reply brief before the Sixth Circuit panel acted.

On Friday evening, October 10, 2008, the three-judge panel granted the Secretary's emergency motion to stay the district court's TRO. 6th Cir. Panel Op. at 2. While the panel did not resolve the issue of whether HAVA creates a private right of action, the panel concluded that the district court abused its discretion in granting the TRO. *Id.* at 5, 6. Applying the plain language of the statute, the panel found that "Ohio is likely in compliance with HAVA." *Id.* at 8. Accordingly, the panel concluded, "the likelihood that ORP will succeed on the merits is slight and the likelihood that the Secretary will succeed is great." *Id.* at 9. The panel also recognized the substantial harm the district court's TRO poses. *Id.* at 10.

The next day—Saturday, October 11, 2008—ORP filed a one-page renewed petition for immediate rehearing en banc. The Secretary did not have an opportunity to respond to this petition. (Under Fed. R. App. P. 35, a party may respond to a petition for rehearing en banc only after the court requests a response; the Sixth Circuit did not request a response.)

On the afternoon of Tuesday, October 14, 2008, the Secretary issued a press release explaining that she directed Ohio's county boards of elections to "thoroughly review and investigate specific allegations of voter registration fraud, illegal voting, or voter suppression." Press Release, Ohio Secretary of State (Oct. 14, 2008) (attached as Ex. 1). She also requested the boards to assist in crafting a solution

that meets three key metrics: (1) create a uniform process to properly utilize information about mismatches; (2) protect voters from purges based on a mismatch; and (3) protect boards from litigation by ensuring compliance with federal law, which does not allow systematic purges within 90 days of a federal election. *Id.* Finally, the Secretary explained that once a solution is developed, "we will upgrade our voter query system and will issue instructions to guide counties in their use of this information." *Id.*

On the evening of Tuesday, October 14, 2008, a divided Sixth Circuit, sitting en banc, vacated the panel's order and denied the Secretary's motion to stay the district court's TRO. 6th Cir. En Banc Op. at 15. The en banc court first disagreed with the panel's interpretation of HAVA, *id.* at 5, and therefore concluded that ORP was likely to succeed on the merits. Second, the en banc court rejected the Secretary's risk-of-harm arguments. *Id.* at 7-9. Finally, the en banc court did not decide the "close" question of whether HAVA creates a private right of action. *Id.* at 12-13. Instead, according to the en banc court, the district court was within its discretion, because this question is a difficult one, to conclude that ORP has a private right of action under HAVA. *Id.* at 13. Six judges dissented.

ARGUMENTS IN FAVOR OF A STAY

Either Justice Stevens as circuit justice or the Court as a conference has the power to stay a lower court's order. *See Emmett v. Johnson*, No. 07A304, 2007 U.S. LEXIS 11679 (Oct. 17, 2007); *San Diegans for Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856 (2006) (Kennedy, J.); *Mikutaitis v. United States*, 478 U.S.

1306 (1986) (Stevens, J.). A stay is required here because ORP has shown no likelihood of success on the merits of a claim that never should have been brought in federal court, let alone so close to the election.

A. HAVA does not confer a private right of action that ORP can enforce under § 1983.

The law is clear that ORP has no rights under HAVA that are enforceable in a § 1983 action. ORP's likelihood of success on this issue is therefore nil. In stating that "there are several reasons for accepting the district court's probability-of-success-prediction on this issue," 6th Cir. En Banc Op. at 11, the en banc court ignored this Court's, and its own, well-settled § 1983 precedent.

For a statute to be enforced in a § 1983 suit, Congress must have clearly intended to create a private right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-85 (2002). By its plain terms, § 1983 provides a remedy only for "*rights*, not the broader or vaguer 'benefits' or 'interests'"; thus, the question is "whether Congress *intended to create a federal right*." *Id.* at 283. To "unambiguously confer[]" a privately enforceable right, *id.*, the statutory "text must be 'phrased in terms of the persons benefited,'" *id.* at 284 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n.13 (1979)). Moreover, even where "explicit rights-creating terms" exist, "a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). It is not enough for a statute to "'speak[] in terms of rights,'" *id.* at 289 n.7 (quoting *Pennhurst State Sch.*

& Hosp. v. Halderman, 451 U.S. 1, 18-20 (1981) (internal quotation marks omitted)), with an "'aggregate' focus," *id.* at 288 (quoting *Blessing v. Freestone*, 520 U.S. 329, 288 (1997)). Instead, the statute must show a "concern[] with 'whether the needs of any *particular person* have been satisfied.'" *Id.* (quoting *Blessing*, 520 U.S. at 343) (emphasis added).

The HAVA provision under which ORP seeks relief—HAVA section 303, codified at 42 U.S.C. § 15483(a) (cited at Compl. ¶ 42)—in no way reflects a congressional intent to protect particular persons by creating a privately enforceable right. HAVA section 303 concerns statewide registration databases. It requires Ohio, "through [its] chief election official"—the Secretary—to "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list." 42 U.S.C. § 15483(a)(1)(A). The database must "contain[] the name and registration information of every legally registered voter in the State and assign[] a unique identifier to each legally registered voter in the State," *id.*, and "[t]he computerized list," in turn, "shall serve as the official voter registration list for the conduct of all elections for Federal office in the State," *id.* § 15483(a)(1)(A)(viii). Section 303 imposes on the Secretary additional administrative duties related to the database. *Id.* § 15483(a). The provision addresses only the obligations of state election officials; nowhere does it discuss the rights of individuals or even groups.

Congress's singular focus in HAVA section 303 on state officials' administrative duties is underscored by the remedies it supplied for shortcomings in

the discharge of those duties. *See Gonzaga*, 536 U.S. at 289 (explaining that the failure of the Family Educational Rights and Privacy Act of 1974 ("FERPA") "to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions"). As part of the administrative scheme, Congress required each State to establish an administrative complaint procedure for resolving grievances under the statute. 42 U.S.C. § 15512. Congress also authorized the United States Attorney General to bring a civil action to enforce HAVA against the States, 42 U.S.C. § 15511—much as FERPA provided for enforcement by the Secretary of Education, *see Gonzaga*, 536 U.S. at 289. Congress would have had no reason to create these review mechanisms if it believed citizens already had a private cause of action under the statute.

Despite *Gonzaga*'s clear guidance on this issue, the en banc Sixth Circuit thought the question was a close one because the Sixth Circuit had held in an earlier case—*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam)—that a *different* provision of HAVA *does* confer a private right of action under § 1983. Even assuming that *Sandusky County* is correct,[1] the en banc court ignored the stark textual differences between HAVA section 303, at issue here, and HAVA section 302, at issue in *Sandusky County*. HAVA section 302 deals with provisional ballots. It provides:

> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the

[1] This Court has never confirmed that section 302 confers a private right of action enforceable under § 1983, and the United States has taken the contrary position. *See* Br. for United States as Amicus Curiae, *Sandusky County Democratic Party v. Blackwell*, Nos. 04-4265, 04-4266 (6th Cir.), *available at* http://www.usdoj.gov/crt/voting/hava/oh_brief.htm.

> individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot [consistent with certain requirements].

42 U.S.C. § 15482(a). In holding that "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous," the *Sandusky County* court noted that the provision's text "mirrors the rights-creating language of Title VI of the Civil Rights Act of 1964 and Education Title IX of the Amendments of 1972, which both state that 'no person . . . shall . . . be subjected to discrimination.'" *Sandusky County*, 387 F.3d at 572-73. Section 303, by contrast, contains no such language. Instead, section 303's text, as explained above, is directed wholly toward state election officials on issues related to the statewide voter registration database. Section 303 has nothing to say about individuals' rights pertaining to the administrative database.

The en banc majority wondered why Congress would create two "halves of HAVA," one of which—section 302 pertaining to provisional ballots—is privately enforceable, the other of which—section 303 pertaining to the statewide database—is not. 6th Cir. En Banc Op. at 13. Again, assuming that *Sandusky County* was correct that section 302 confers a privately enforceable right, Congress's intent is hardly inexplicable. Congress did in fact intend the legislation to have two halves with two different, but related, purposes. In section 302, Congress intended to protect individuals' right to vote, so long as they were properly registered, by means of a provisional ballot. Because that provision specifically addressed the individual right to vote, Congress understandably made it privately enforceable. In section

303, on the other hand, Congress created an administrative scheme—a statewide computer database maintained by state and county election officials. These two halves were designed respectively "to make it easier to vote and tougher to cheat." 148 Cong. Rec. S10488 (daily ed. Oct. 16, 2002) (statement of S. Bond). And as with other administrative schemes—like FERPA, for instance, *see Gonzaga*, 536 U.S. at 289—Congress intended to remedy violations of that administrative scheme through administrative means.

In allowing a private HAVA suit to go forward under § 1983, the en banc Sixth Circuit has thrown open the doors of federal courthouses to potentially countless lawsuits as Election Day approaches. Any eligible voter now may enforce any administrative provision of HAVA simply by claiming—without evidentiary support—that voter fraud is occurring. That is not what Congress contemplated. HAVA struck a careful federal-state balance. *See Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008). It enacted provisions to ensure the right to vote through provisional ballots and created an administrative scheme to ensure that States have computerized voter databases. But in deference to the States' traditional control over local election matters, it expressly left "[t]he specific choices on the methods of complying with" HAVA's requirements "to the discretion of the State[s]." 42 U.S.C. § 15485; see also Gonzaga, 536 U.S. at 286 n.5 (stating that inferring a private remedy under FERPA would require a "judicial assumption, with no basis in statutory text, that Congress intended to set itself resolutely against a tradition of deference to state and local school officials").

The question whether HAVA section 303 is enforceable through § 1983 is not a close one. Because HAVA section 303 contains no rights-conferring language, it cannot form the basis of a civil rights action under § 1983. Thus, there is *no* likelihood that ORP will succeed on its HAVA claim.

B. The en banc Sixth Circuit ignored this Court's clear admonition in *Purcell* not to enjoin state electoral processes close to Election Day without careful factual development.

In no uncertain terms, this Court has discouraged judicial orders that enjoin electoral processes close to Election Day. In *Purcell*, the Court summarily reversed a Ninth Circuit order that enjoined enforcement of an Arizona voter-identification requirement several weeks before the election. The Court explained that the circuit court, "[f]aced with an application to enjoin operation of voter identification procedures just weeks before an election . . . was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." 127 S. Ct. at 7. The Court added: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* Thus, in light of "the imminence of the election and the inadequate time to resolve factual disputes," the Court vacated the Ninth Circuit's order and "allow[ed] the election to proceed without an injunction suspending the voter identification rules." *Id.* at 8.

The Sixth Circuit's decision to affirm the district court's TRO contravenes the teachings of *Purcell* in three ways. First, it endorses the filing of litigation on the

eve of an election. Second, it relieves plaintiffs from having to produce any facts in support of their arguments for extraordinary equitable relief. And third, it ignores the real and tangible dangers that such last-minute meddling can have on the electoral process.

1. The Sixth Circuit's excusal of ORP's eleventh-hour filing was wrong because the change to the database about which ORP is concerned occurred more than two years ago, and ORP had no explanation for sitting on its hands.

Purcell's admonition carries even greater force in this case, where the party seeking to enjoin the electoral process could have filed suit earlier. "As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and [a party's] claim to . . . serious injury becomes less credible by his having slept on his rights." *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980).

The Secretary began implementing HAVA's requirements before the current Secretary even took office in January 2007. From as early as 2004, the Secretary's office has been working with the Bureau of Motor Vehicles and county boards of elections to create statewide voter registration database as HAVA requires. The Secretary inherited the current version of the database from her predecessor, and both the 2006 general election as well as Ohio's March presidential primary took place with this very database in place. ORP never objected to the database before this election cycle. ORP's first objection to the database's operation appeared on September 26, 2008, when it filed its complaint.

Although the en banc court excused ORP's tardiness on the ground that "[a]ll of this came to a head . . . when the Secretary issued her August advisory," 6th Cir. En Banc Op. at 9, that explanation is flatly incorrect. The document to which the Sixth Circuit referred—Directive 2008-63—stated that prospective voters could, during a five-day window in early October, register to vote and cast an absentee ballot at the same time. *See State ex rel Colvin v. Brunner*, No. 2008-1813, 2008 Ohio Lexis 2588 (Ohio Sept. 29, 2008) (affirming the advisory's interpretation of state law); *see also* Directive 2008-63: Processing Voter Registration Applications Received the Week Immediately Preceding a Voter Registration Deadline (Aug. 13, 2008), *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-63.pdf. It did *not* address the Secretary's existing policies pertaining to the statewide voter database. Therefore, contrary to the en banc court's erroneous suggestion, the current Secretary in Directive 2008-63 did not change "the office's prior policy on implementing § 15843(a)(5)(B)(i)." 6th Cir. En Banc Op. at 10. Had ORP approached her earlier, the Secretary would have had ample time to review the database's existing functionality and to consider carefully any requests or suggestions for improving it.

Nor should ORP be excused from its last-minute filing because Ohio officials publicly encouraged parties to this fall's election to resolve disputes early and, if possible, by means other than litigation. *See id.* at 9-10. ORP did not take that opportunity to flag issues pertaining to HAVA. More to the point, far from having

caused ORP's late filing, that encouragement was designed to *prevent* circumstances precisely like this one.

2. The Sixth Circuit excused ORP of its burden to establish irreparable harm.

When the looming deadlines of an election preclude an evidentiary hearing, *Purcell* counsels courts to steer away from equitable relief, not toward it. *See* 127 S. Ct. at 8 ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules."). In the face of that clear guidance, the district court here took the opposite path. Despite having ample time for adversarial testing of ORP's claims, the court denied the Secretary's request for an evidentiary hearing, accepted ORP's allegations of voter fraud at face value, and issued the TRO.

The en banc court improperly endorsed that route, brushing *Purcell* aside by saying "it is unclear why it ought to control" this circumstance, as "there [was] sufficient time to resolve . . . fact disputes" between the parties. 6th Cir. En Banc Op. at 10. This is a perversion of *Purcell*, which gave the district court two options. The court could have (and should have) conducted a limited factual inquiry into the basis of ORP's TRO request, or it could have denied the TRO request if there was not sufficient time for factual inquiry. The district court instead chose, and the Sixth Circuit endorsed, a third route—grant the TRO without any factual hearing. The consequences of that choice are now evident: The en banc panel's analysis is rife with factual allegations that are either inaccurate or incomplete. *See, e.g., id.* at

10 ("To this day, it remains unclear when the Secretary told the public that she had changed the office's prior police on implementing § 15843(a)(5)(B)(i) . . . ."); *id.* ("Nor . . . are the plaintiffs challenging an *established* election practice of the State. The established practice in this case is the one the State used in the last national election, not the Secretary's innovation of it for this one."). The Secretary has innovated nothing here; the database at issue was developed and implemented by her predecessor and operated by her without significant change.

Furthermore, in weighing the relative harms to the parties, the en banc court emphasized the need to "preserv[e] the value of each vote from the diluting effects of fraud" and the fact that "[t]he window to detect and deal with vote-diluting fraud" was rapidly closing. 6th Cir. En Banc Op. at 7-8. But this analysis ignores the fact that the record contains no evidence of actual voter fraud, only rank speculation that out-of-state residents are flooding into Ohio, registering to vote with false social security numbers and addresses. *See* ORP's Renewed Motion for TRO at 6, Dist. Ct. Dkt. No. 36. Under the Sixth Circuit's framework, a party need only invoke the *specter* of voter fraud to meet its burden of showing irreparable injury and obtain a TRO. Today, it is "the opportunity to follow up on voter-registration mismatches." 6th Cir. En Banc Op. at 8. Tomorrow, it will be voter identification. The day after, it will be election-day poll monitoring.

The imminence of an election does not justify a departure from the well-established requirements for obtaining temporary injunctive relief. Otherwise, the

Secretary's attention will be directed at a torrent of last-minute TRO orders, and the accompanying threat of sanctions, rather than overseeing a statewide election.

3. The Sixth Circuit ignored a real and substantial threat of disruption to the upcoming election.

The en banc court repeatedly criticized the Secretary's concerns about reprogramming the statewide database, and the accompanying disruption on the electoral process, as unsupported by evidence. *See, e.g.*, 6th Cir. En Banc Op. at 14-15 ("[O]ne of the key obstacles to the Secretary's request for relief is the lack of any affidavit or other factual support for her arguments that altering the relevant computer programs will be difficult or create material risks to other aspects of the election process."). This charge is neither fair nor accurate.

The charge is not fair because the Secretary had no opportunity, given the district court's highly unusual proceedings, to introduce the evidence that the Sixth Circuit later found lacking. On the question of HAVA compliance, the Secretary faced a moving target. ORP originally alleged that the Secretary was not performing any matching between her database and the BMV. *See* ORP's Renewed Motion for TRO, at 6 (Dist. Ct. Dkt. 36) ("[T]he voter registration database does not instantly match the information against the records of the Bureau of Motor Vehicles."). The Secretary crafted her response based on this theory and submitted several relevant affidavits.

After precluding the Secretary from offering any live testimony about the functionality of the database, the district court decided that, although the statewide database *did* match information with the BMV's records, the Secretary violated

HAVA because the database did not allow for an "effective way to identify or isolate mismatches from the rest of the pile" through batch sorting or listing. TRO Order II at 11. In light of this moving target and the district court's refusal to allow witnesses at the hearing, the Secretary cannot now be faulted for failing to develop the factual record on her claims of irreparable harm.

Nor is it accurate to say that the electoral process will not be disrupted.[2] On the contrary, the Secretary's experience thus far in attempting to comply with the TRO shows that the district court's order is highly disruptive. Although the district court afforded only a short window of time for the Secretary to comply with the TRO, the Secretary immediately directed her staff to take all necessary steps to comply with the TRO. Thus far, the Secretary has been able only to reprogram the database to produce rudimentary batch lists of mismatches. Those batch lists, however, will display myriad discrepancies between the database, BMV records, and social security records. Many of those discrepancies bear no relationship whatsoever to a voter's eligibility to vote a regular, as opposed to a provisional, ballot. Furthermore, voters may, consistent with state law, provide either a social security number or Ohio driver's license number at the time of registration (or, if the registrant has neither, the State assigns a unique identifier). For those voters who provided neither a social security number nor a driver's license number, the

[2] The Secretary asserted before the Sixth Circuit that "the TRO threatens to throw Ohio's entire statewide database . . . into chaos" because, among other things, the database would soon "be used to make the State's poll books." Secretary's Emergency Mot. at 2. Although the Secretary believed that assertion to be true at the time she filed her brief on a tightly compressed timetable, she now believes, based on later-discovered information, that the TRO will not affect the poll books. It will, however, affect other electoral processes.

Secretary's preliminary assessment is that system will automatically return a mismatch, and that a significant majority of the mismatches reported on these batch lists will be erroneous.

As contemplated by the district court, the Secretary must transmit these master lists to the county boards of elections by this Friday, October 17. Once this batch of information is released, the potential for disruption to the electoral process becomes palpable and irreversible.

First, the county boards of election will be faced with an inordinate number of mismatches to sift through.[3] Because the National Voter Registration Act prevents the systematic cancellation of voter registrations less than 90 days before an election, *see* 42 U.S.C. § 1973gg-6(c)(2)(A), the county boards may not, as a wholesale matter, disqualify each of these mismatched registrants. Instead, each mismatch will require an individualized determination by the county boards. And those boards do not have the resources to review the voter lists in the next two weeks to determine whether mismatches are worthy of disqualification, given boards' many other election-related responsibilities.

Second, the Secretary has not yet developed procedures and standards to govern mismatch determinations, nor, at this late juncture, can she train and assign staff to oversee and consult with the 88 county boards when they begin

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[3] While the statutory deadline for private individuals or groups to file challenges against Ohio voters passes today, interested parties such as ORP may also ask the boards to investigate mismatches before Election Day. *See* Ohio Rev. Code § 3509.07 ("The vote of any absent voter may be challenged for cause in the same manner as other votes are challenged, and the election officials shall determine the legality of that ballot."); *see also* 6th Cir. En Banc Op., at 7 ("At most, the identification of a mismatch allows a county board to investigate whether a mismatch has a legitimate explanation.").

reviewing the mismatches. Such policies and procedures are normally drafted and promulgated months before Election Day after full consultation with local elections officials, political parties, and interested groups. Any effort to complete these tasks now will inevitably cause confusion and inconsistency across the state.

Third, this dynamic will trigger litigation by voters and voter groups claiming that they have been improperly disenfranchised on the eve of the election. *See* Br. of ACLU of Ohio, et al., at 7, *Republican Party of Ohio v. Brunner*, No. 08-4322 (6th Cir.) ("Latino citizens are susceptible to problems matching compound names, and African Americans are frequently not matched because of their use of unique names, or derivative spellings of common names."). Furthermore, the potential for variation in mismatching decisions by the 88 county boards of election will all but invite an equal protection challenge. *See Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (emphasizing the need for "adequate statewide standards for determining what is a legal vote," "practicable procedures to implement them," and "orderly judicial review of any disputed matters that might arise").

As a final matter, the en banc court stated that "[n]othing about Judge Smith's order will limit a single individual's right to vote in the normal process or at minimum through a provisional ballot." 6th Cir. En Banc Op. at 8. This perspective is short-sighted. *Purcell* is plainly concerned with the effects of judicial intervention on the electorate. *See* 127 S. Ct. at 7 ("[T]he possibility that qualified voters might be turned away from the polls would caution any district judge to give

careful consideration to the plaintiffs' challenges."). As Judge Moore correctly observed:

> Because of the time limitations, voters whose information does not match may not be aware that there is any question about their registration and may not have to be able to obtain the documents necessary to further verify their registrations. It is unlikely that the state can properly investigate all of the mismatches created by the TRO, and as a result, properly registered voters will likely be forced to cast provisional ballots, will believe that they cannot vote, or will be turned away at the polling places.

6th Cir. En Banc Op. (Moore, J., dissenting), at 16. If the Sixth Circuit's decision is allowed to stand, an untold number of legitimate voters in Ohio will be forced to reestablish the bona fides of their vote before the county boards of elections, or they will stay home out of frustration or confusion. ORP's unsupported invocations of voter fraud hardly warrant such monumental interference with the electoral process.

CONCLUSION

The Court should grant the request for an emergency order staying the temporary restraining order.

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No. 08A332

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER BRUNNER, OHIO SECRETARY OF STATE,

Applicant,

v.

OHIO REPUBLICAN PARTY AND LARRY WOLPERT,

Respondents.

OPPOSITION TO APPLICATION FOR STAY

OCT 1[illegible]

To the Honorable John Paul Stevens, Circuit Justice for the Sixth Circuit:

Applicant's request for the "extraordinary" remedy of a stay from this Court, *Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (Rehnquist, C.J., in chambers) (internal quotation omitted), is itself extraordinary because (1) the Sixth Circuit sat *en banc* on an emergency basis to deny such a stay below, *see Ohio Republican Party v. Brunner*, __ F.3d __, 2008 WL 4571959 (6th Cir. Oct. 14, 2008) (*ORP*), (2) applicant has not filed a petition for certiorari, and does not even pretend that the Sixth Circuit's *en banc* decision to deny a stay warrants this Court's review, and (3) there is no underlying merits decision here, only a temporary restraining order (TRO) that is by its very nature preliminary and discretionary. As the *en banc* Sixth Circuit took pains to point out, if applicant encounters legitimate difficulties in complying with her obligations under the TRO, she is free to return to the district court to seek modification of those obligations. *ORP*, 2008 WL 4571959, at *9. In a hierarchical judicial system, "we entrust the district court to deal fairly with future

implementation issues implicated by [its TRO]." *Id.* Rather than trying to resolve any problems in the district court, however, applicant now presents her grievances with the TRO to this Court, as if this Court were in the business of fine-tuning emergency TRO relief. This Court is not in that business, and should resist applicants' entreaties to become entangled in this dispute.

As a threshold matter, it is important to understand the nature of this dispute. Applicant—Ohio's elected Secretary of State—cannot and does not deny that the Help America Vote Act of 2002 (HAVA), 42 U.S.C. § 15301 *et seq.*, requires her to "match" the information in Ohio's computerized voter registration database with information in the database of Ohio's Bureau of Motor Vehicles "to verify the accuracy of the information provided on applications for voter registration." 42 U.S.C. § 15483. Rather, the Secretary takes the remarkable position that HAVA does not require her to *do anything* with the "mismatches" generated by such "matching," and in particular does not require her to share the "mismatch" information with county boards of elections in a manner that gives those boards a meaningful opportunity to investigate the mismatches (and hence weed out invalid voter registrations and prevent voter fraud) before counting votes.

If ever there were an unappealing argument presented to this Court by a party seeking emergency equitable relief, this is it. As the Sixth Circuit emphasized, no one is "arguing that a mismatch necessarily requires that a registered voter be removed from the rolls"; rather, "the identification of a mismatch allows a county board to investigate whether the mismatch has a legitimate

explanation." *ORP*, 2008 WL 4571959, at *5. Plaintiffs are thus seeking to vindicate the right to vote by preventing the votes of qualified voters from being diluted by the votes of unqualified or fraudulent voters. "'The right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the exercise of the franchise.'" *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (*per curiam*) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). The Secretary's steadfast refusal to provide the HAVA "mismatch" data to the county boards of elections in a meaningful way that actually allows them to use that data—which is all that the TRO requires her to do—should be a cause for outrage, not a cause for extraordinary equitable relief.

ARGUMENT

It is telling that the Secretary's application for a stay does not even articulate the standards for obtaining such emergency relief from this Court. "The practice of the Justices has settled upon three conditions that must be met" before issuance of a stay. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). "There must be [1] a reasonable probability that certiorari will be granted (or probable jurisdiction noted), [2] a significant possibility that the judgment below will be reversed, and [3] a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Id.* As explained below, none of these factors—much less all three of them—remotely justifies the extraordinary remedy of a stay in this case.

A. Reasonable Probability That Certiorari Will Be Granted

The Secretary apparently hopes to avoid the first factor in the stay analysis—"a reasonable probability that certiorari will be granted," *id.*—by simply declining to file a petition for certiorari. But surely it cannot be *easier* to obtain an emergency stay where, as here, a party does not file a petition for certiorari than where a party does file such a petition and seeks a stay pending disposition of the petition. If that were the case, then no one ever would file a petition before seeking emergency relief.

It is no accident that the Secretary has declined to file a petition, because she cannot credibly claim that the decision below warrants this Court's review. No court has yet decided the merits of this dispute. Rather, all that has happened is that the district court entered a TRO (which requires a balancing of several factors, including (1) the likelihood of success on the merits, (2) irreparable injury to the moving party, (3) injury to the nonmoving party, and (4) the public interest), *see Ohio Republican Party v. Brunner*, __ F. Supp. 2d __, 2008 WL 4560772, at *3 (S.D. Ohio Oct. 9, 2008), a divided panel of the Sixth Circuit granted the Secretary's motion to stay the TRO, and the *en banc* Sixth Circuit then denied the Secretary's motion to stay the TRO, *see ORP*, 2008 WL 4571959, at *6-9.

The issue presented here, in other words, is not the merits of plaintiffs' HAVA claim or even plaintiffs' right to bring such a claim under 42 U.S.C. § 1983. The lower courts will deal with those issues in due course. Rather, the issue presented here is whether there is any basis for this Court to review the *en banc* Sixth Circuit's conclusion that the district court did not abuse its discretion in

balancing all the relevant factors and entering a TRO. The Secretary's tacit admission that this issue does not warrant this Court's review should be a red flag highlighting the weakness of her request for emergency relief from this Court.

B. Significant Possibility That The Judgment Below Will Be Reversed

The Secretary fares no better under the second factor in the stay analysis, "a significant possibility that the judgment below will be reversed." *Barnes*, 501 U.S. at 1302. The Secretary contends, as she did below, that plaintiffs have no likelihood of success on the merits of their HAVA claims because they have no private right of action under § 1983 to enforce HAVA. *See* Stay App. 9-14. Tellingly, the Secretary does not argue, as she did below—presumably because that argument is so unappealing both legally and politically—that HAVA does not require her to provide county elections boards with meaningful access to the "mismatches" generated by HAVA matching. Although Congress provided that "[t]he specific choices on the *methods* of complying with the requirements of this subchapter shall be left to the discretion of the State," 42 U.S.C. § 1[illegible] (emphasis added), that does not mean that *compliance* with the statute is left to the discretion of the State. Thus, a State need not implement any particular system to address HAVA mismatches, but it may not simply throw them in the trash. *See ORP*, 2008 WL 4571959, at *2. As the *en banc* Sixth Circuit noted, "[s]o far as the this record is concerned, the Secretary has given no tenable explanation why her current interpretation of [HAVA], as opposed to her office's prior implementation of the law [to give county boards of elections meaningful access to mismatches] remotely

furthers the anti-fraud objective of the law." *Id.* at *3; *see also id.* ("A mismatch that she does not allow the county boards of election meaningfully to track down is not a usable mismatch."); *id.* ("As far as we can tell, the problem with the current system is not that it is insufficiently user-friendly but that it is effectively useless."); *see also id.* at *12 (Kethledge, J., concurring).

On the § 1983 point, the *en banc* Sixth Circuit took pains to emphasize that the ultimate issue whether plaintiffs have a private right of action to enforce HAVA's "matching" provision is not presented here. *See ORP*, 2008 WL 4571959, at *7-8. That issue, the Sixth Circuit recognized, is "difficult," "close," and "deeply intricate." *Id.*; *see also id.* at *10 (Gibbons, J., concurring). The upshot of that point is that the district court did not remotely abuse its discretion in concluding, at the TRO stage, that plaintiffs had established a likelihood of success on the merits. The issue now presented to this Court, then, is not whether plaintiffs definitively may enforce HAVA rights under § 1983, but whether the § 1983 issue is so crystal clear that (contrary to the conclusion of the *en banc* Sixth Circuit) the district court abused its discretion in analyzing the likelihood-of-success-on-the-merits prong of the TRO analysis. The Secretary seems to recognize that heightened burden by arguing that "[t]he law is clear" on this score, Stay App. 9, and that the question "is not a close one," *id.* at 14, but of course even the Sixth Circuit panel that originally reviewed the TRO did not rely on the § 1983 point in staying the TRO. *See ORP*, 2008 WL 4581959, at *7 (making this point).

As a threshold matter, drawing the line between those federal statutes that may be enforced under § 1983 and those that may not has proven to be a difficult venture, and one that has repeatedly called for clarification by this Court. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Certainly, it was reasonable for the district court and the *en banc* Sixth Circuit to conclude that the § 1983 issue in this case is not free from doubt.

The Secretary insists, however, that Congress unmistakably shut "the courthouse door" on private parties seeking to enforce HAVA under § 1983. Stay App. 2. Her zeal on this point is misplaced. The Sixth Circuit has previously recognized that HAVA rights may be enforced under § 1983, *see Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (*per curiam*), and the Secretary did not challenge that point below (just as she does not challenge that point here, *see* Stay App. 11 & n.1). Nonetheless, the Secretary notes that *Sandusky* involved a different HAVA provision than is at issue here, and argues that "the en banc court ignored the stark textual differences between HAVA section 303, at issue here, and HAVA section 302, at issue in *Sandusky County*." Stay App. 11. But that is a distinction without a difference.

HAVA recognizes that the constitutionally protected right to vote can be abridged in two ways: either by denying qualified voters access to ballots, or by granting unqualified or fraudulent voters access to ballots and thereby diluting the votes of qualified voters. As the Eleventh Circuit recently explained, HAVA thus strikes "a balance between promoting voter access to ballots on the one hand and preventing voter impersonation on the other." *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also ORP*, 2008 WL 4571959, at *1, 5. Just as § 302 of HAVA protects an individual's federal right to vote by creating a mechanism for provisional ballots, § 303 protects an individual's federal right to vote by preventing vote dilution through fraud. As Senator Bond explained in discussing the Conference Report on HAVA, "[t]his legislation recognizes that illegal votes dilute the value of legally cast votes—a kind of disenfranchisement no less serious than not being able to cast a ballot." 148 Cong. Rec. S10488 (2002). "If your vote is canceled by the vote of a dog or a dead person, it is as if you did not have a right to vote." *Id.* To allow only the rights conferred by § 302, and not the rights conferred by § 303, to be enforceable under § 1983 would destroy the very "balance" that HAVA established.

The Secretary's argument that nowhere does § 303 of HAVA mention a privately enforceable right, *see* Stay App. 11-12, thus misses the point: nothing in § 1983 requires Congress to use "magic words" to create a federally enforceable right. To the contrary, as this Court has recognized, "'[t]he state's burden is to demonstrate that Congress shut the door to private enforcement either expressly,

through specific evidence from the statute itself, or impliedly through a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Gonzaga*, 536 U.S. at 285 n.4. Here, as the *en banc* Sixth Circuit recognized, the district court did not remotely abuse its discretion by concluding that the Secretary had failed to carry that burden.

C. Likelihood Of Irreparable Injury

Nor is there any merit to the Secretary's argument that she will face irreparable harm if the TRO is not stayed. *See* Stay App. 19-22; *see generally Bagley v. Byrd*, 534 U.S. 1301, 1302 (2001) (Stevens, J., in chambers) (denying request for stay where applicant failed to demonstrate irreparable injury). Here, as in the Sixth Circuit, the Secretary offers no more than a speculative "parade of horribles" to justify her challenge to the TRO. And here, as in the Sixth Circuit, the short answer to the Secretary's grievances is that the door to the district court remains open to the Secretary to seek to modify the TRO if she produces evidence that such modification is warranted.

If anything, however, the Secretary only continues to ramp up her hyperbole. Although as recently as yesterday the Secretary's spokesman was reassuring the media that "[t]hings already are in motion to comply" with the TRO, and "[t]he computer work actually began last week," Terry Kinney, *Ohio Elections Chief Says She'll Comply With Court*, Associated Press (10/15/08), the Secretary now tells this Court that emergency intervention is required to "restore order to Ohio's election, which was destabilized" by the TRO, Stay App. 1. The problem for the Secretary, as

the *en banc* Sixth Circuit noted, is that she has failed to introduce a shred of *evidence* to support her claims of gloom and doom.

Although the Secretary complains that the district court "denied the Secretary's request to call *witnesses*" at a full-blown evidentiary hearing, Stay App. 1 (emphasis added)—there was no time to hold a such hearing—it is important to note that the district court in no way limited the Secretary's ability to present as much *documentary evidence* as she wanted. And indeed the Secretary availed herself of this opportunity, filing a "Notice of Filing of Evidence" in support of her memorandum in opposition to the TRO attaching several affidavits and voluminous supporting materials. It is simply not true, then, that the Secretary "had no opportunity," Stay App. 19, to present evidence on the practical difficulties associated with providing the county boards of elections with meaningful access to the HAVA "mismatches" in a way that would allow them to verify voter registration information before counting votes.

To the extent the facts have changed, or further facts have been developed, the Secretary can present those facts to the district court in the first instance. As the Court of Appeals explained, if compliance with the TRO would be

> exceedingly difficult for the Secretary, or worse if [such compliance] would create a meaningful risk of harm to other parts of the [statewide voter registration] database at this stage in the year, she needs to explain why rather than allowing her attorneys to speculate why. The record on all of this is ear-splittingly silent—all the more conspicuously so given that it is the key risk of harm identified on the Secretary's side of the case and it is the one risk that must be balanced against the risk ... of allowing potentially fraudulent votes to be forever counted.

ORP, 2008 WL 4571959, at *6; *see also id.* at *5 (the Secretary's assertions regarding the difficulty of compliance with the TRO are "never explained, much less supported by affidavits from the Secretary or her office"); *id.* at *6 ("[The Secretary's] argument raises more questions than it answers because she again never explains why [the TRO could create other problems for the election], much less supports her position with affidavits from someone who would know."); *id.* at *9 ("[O]ne of the key obstacles to the Secretary's request for relief is the lack of any affidavit or other factual support for her arguments that altering the relevant computer programs will be difficult or will create material risks to other aspects of the election process."). Notwithstanding the Sixth Circuit's invitation, the Secretary has not returned to the district court to seek modification of the TRO. Rather, the Secretary spent the day yesterday not only filing her application for stay in this Court, but also participating in a panel discussion at the National Press Club in Washington, D.C. *See* Catherine Candisky, *200,000 Voting Registrations In Doubt*, Columbus Dispatch (10/16/08). If the Secretary were really "undertaking her best efforts to comply with the TRO," Stay App. 2, it is unclear why she would want or expect emergency relief from this Court. *See, e.g., McGraw-Hill Cos. v. Procter & Gamble Co.*, 515 U.S. 1309, 1311 (1995) (Stevens, J., in chambers) (denying application for stay where applicant did not seek appropriate relief from the district court).

Nor has the Secretary provided any justification for her public-relations position that "[i]f the Sixth Circuit's decision is allowed to stand, an untold number

of legitimate voters in Ohio will be forced to reestablish the bona fides of their vote before the county boards of elections, or they will stay at home out of frustration and confusion." Stay App. 23. This is very similar to the argument, recently rejected in *Crawford v. Marion County Elec. Bd.*, 128 S. Ct. 1610, 1620-24 (2008), that any effort to verify the accuracy of voter registration, and hence prevent voter fraud and unlawful vote dilution, will have the effect of chilling and disenfranchising legitimate voters. Nothing in the district court's TRO remotely purports to require "an untold number of legitimate voters ... to reestablish the bona fides of their vote," Stay App. 23; rather, the TRO simply requires the Secretary to provide the HAVA "mismatches" to the county boards of elections in a format they can use to verify voter registration before counting ballots. And to the extent the Secretary believes the TRO is too broad or creates a burden on voters, she is free to ask the district court to modify it accordingly, which she has not done.

Finally, the Secretary cannot justify emergency relief from this Court by conjuring up the spectacle of "a flood of lawsuits across the Nation [alleging] vague claims concerning state officials' administrative actions." Stay App. 2; *see also id.* ("Those [hypothesized future] lawsuits will interfere with other state officials' efforts to administer smoothly the election."); *id.* at 4 ("[I]t is difficult to predict what additional lawsuits might follow."); *id.* at 22 (predicting "litigation by voters and voter groups claiming that they have been improperly disenfranchised on the eve of an election."). Such speculation provides no basis for staying the TRO, and there is nothing "vague" about plaintiffs' claims here. To the contrary, as the

district court explained, the Secretary "*admitted* that the county boards of elections had no way to search or identify the mismatches" generated by HAVA matching, 2008 WL 4560772, at *6 (emphasis added), and acknowledged that she could rectify the situation in a few days, *id.* at *5. The Secretary's vague assurance that she is "taking numerous steps to verify the accuracy of the voter registration lists, to confirm voters' eligibility, and to prevent various forms of fraud in the election," Stay App. 2, provides no explanation for her refusal to share the HAVA "mismatches" apparently within her possession with county boards of elections in a way that will allow them to use that information. An order forcing the Secretary to do her job in compliance with federal law does not impose "irreparable injury."

D. Other Equitable Considerations

Even assuming that the Secretary could satisfy all three of the foregoing conditions, moreover, those conditions "are not necessarily sufficient" to warrant a stay, and "[e]ven when they all exist, sound equitable discretion will deny the stay when 'a decided balance of convenience,' does not support it." *Barnes*, 501 U.S. at 1304-05 (quoting *Magnum Import Co. v. Coty*, 262 U.S. 159, 164 (1923)). "It is ultimately necessary, in other words, to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (internal quotation omitted).

Here, the injury to the Secretary (if any) from the denial of a stay is substantially outweighed by the injury to respondents and to the public interest more generally from the grant of such a stay. The TRO protects plaintiffs from irreparable injury: the dilution of their votes as a result of the Secretary's refusal to

make HAVA "mismatches" available to county boards of elections for investigation before ballots are counted. There can be no question that this injury is irreparable: once the county boards of elections start opening the envelopes containing absentee ballots as early as October 25, it will be impossible to verify the registration of any absentee voter before his or her ballot is counted.

On her side of the equation, the Secretary tries to peddle a laches argument, arguing that plaintiffs brought this lawsuit too late. *See* Stay App. 1, 15. As the *en banc* Sixth Circuit noted, however, the record simply does not bear her out on this score. *See ORP*, 2008 WL 4571959, at *6. The Secretary suggests that plaintiffs should have sued as early as 2004, when her predecessor began to set up the database required by HAVA, or at least when the database was first used in the 2006 general election. *See* Stay App. 15. What the Secretary conveniently fails to mention, however, is that the Ohio voter registration database operated in precisely the way plaintiffs argue it should operate until the Secretary herself changed her policy "[f]or reasons that the record does not reveal and at a time the record does not reveal." *ORP*, 2008 WL 4571959, at *2; *see also id.* at *6. As the *en banc* Sixth Circuit explained, the record shows that the database was originally designed to share mismatch data with the county boards, and had in fact operated in this fashion until the Secretary affirmatively changed that practice at some later date. *See id.* Moreover, as the court below pointed out, the record is silent as to "when the Secretary told the public that she had changed the office's prior policy on implementing § 15483(a)(5)(B)(i) [of HAVA], when she told the public why she made

these changes and whether she has made additional changes to the policy since." *Id.* at *6. The Secretary's assertion that "in June 2006, [her predecessor] programmed the database so that it did not provide notification to counties of certain mismatches," Stay App. 5, has no support whatsoever in the record.

Contrary to the Secretary's assertion, this Court's *Purcell* decision does not create a presumption against granting relief in lawsuits filed close to an election. As an initial matter, any such presumption would be entirely divorced from reality: much election-related litigation necessarily occurs shortly before, or even (as in the case of suits to keep polls open) on, election day. *See ORP*, 2008 WL 4571959, at *6. In any event, such a presumption would turn *Purcell* on its head. At issue in *Purcell* was the constitutionality of a state law that sought to *protect* the right to vote from dilution by requiring voters to show identification. *See* 549 U.S. at 6; *see generally Crawford*, 128 S. Ct. at 1617-20 (noting that states have a legitimate interest in checking voter identification to prevent voter fraud). The *Purcell* Court stressed the importance of avoiding, where possible, issuing court orders close to election polling day, but it did so in the course of vacating the stay of a district court order entered, without any explanation, by a two-judge motions panel of the Ninth Circuit on the eve of an election. *See* 127 S. Ct. at 7. That decision has no bearing whatsoever on this Court's review of the *en banc* Sixth Circuit's reasoned decision to *deny* a motion to stay a district court order.

Finally, the overriding public interest here, which truly should be dispositive, is ensuring the integrity of the process of electing the President of the United

States, and promoting public confidence in that process. *See, e.g., Purcell*, 549 U.S. at 7 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."). For the Secretary to assert that the TRO here creates "a substantial risk of undermining confidence in the electoral process," Stay App. 4, is positively Orwellian. What undermines confidence in the electoral process is the Secretary's steadfast refusal to provide the county boards of elections with meaningful access to the HAVA "mismatches" to allow them to verify registrations before counting votes. That is why the *en banc* Sixth Circuit had little difficulty concluding that "the risks of harm to each party and above all the risks of harm to the public support the TRO." *ORP*, 2008 WL 4571959, at *5.

Accordingly, this Court should deny the application for a stay.

Respectfully submitted,

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In The Supreme Court Of The United States

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OHIO SECRETARY OF STATE,
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OHIO REPUBLICAN PARTY, *et al.*,
Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPLICANT'S REPLY BRIEF IN SUPPORT OF HER APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

To a large extent, ORP's opposition to the Secretary's stay application rests on this mistaken premise: Because the Secretary is doing her best to comply with the district court's order, the TRO does not harm her. But of course the Secretary is trying to comply with the order; anything less would risk contempt of court.

Those good faith efforts only support, rather than undermine, the need for a stay here. As the Secretary explained in her stay application, she has diverted substantial resources from her important pre-Election Day administrative responsibilities to comply with the TRO, to the detriment of Ohio's electoral processes. The district court's order therefore has interfered in the internal administrative workings of Ohio's chief election official in the days before an election. Congress in no way contemplated this kind of federal court oversight of elections, and the Secretary has amply demonstrated the TRO's harmful effects.

Which raises a larger point: It is not the Secretary who bears the burden here; it is ORP. And ORP has not discharged that burden. ORP has shown *no* likelihood of success on the merits, because ORP has no private right of action to enforce the administrative provisions of the Help America Vote Act ("HAVA") under 42 U.S.C. § 1983. Nor has ORP substantiated its claims of irreparable injury—the dilution of legitimate votes by fraudulent ones—with any evidence.

Not to mention that ORP's burden is heightened here by the eleventh-hour nature of its challenge. The Secretary's predecessor—not the current Secretary—set up the database to withhold the mismatch reports that ORP seeks. That action

was fully consistent with HAVA. More to the point, that action was taken *more than two years ago*. ORP has not explained (because it cannot) why it waited so long to sue. Instead, its defense on this score—that the "Secretary affirmatively changed" the database "at some later date," Opp. at 14—is patently false. The Secretary has repeatedly explained that she did not change the database, and ORP (which bears the burden) has introduced no evidence to the contrary. In any event, regardless of the reason ORP came tardily to the court, the fact is that ORP's late filing has yielded a hasty TRO entered just weeks before Election Day.

This Court in *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (per curiam), could not have said more clearly that these kinds of last-minute challenges are not to be countenanced so close to an election. Indeed, this TRO is even more troublesome than the one in *Purcell*, because the injunction there was a *negative* one—barring enforcement of a statute—whereas the injunction here is an *affirmative* one—forcing a state official to take actions that massively disrupt the electoral process. If a federal court is to issue such an intrusive order, it should handle the matter carefully, on the basis of a factual record, not based on a seat-of-the-pants hearing devoid of testimony. The approach of the courts below—enjoin first, ask questions later—is untenable.

To be sure, the district court's discretion is considerable. But it does not reach so far as to allow a district court (1) to upend principles of federalism (2) by micromanaging a state official's administration of a statewide election (3) based on

an erroneous understanding of applicable federal law (4) without undertaking a meaningful factual inquiry (5) just weeks before Election Day.

This Court's intervention is needed to restore order to Ohio's electoral process.

ARGUMENT

A. The Secretary properly presented her stay application to Justice Stevens.

ORP's various arguments that the Secretary did not properly present her stay application to Justice Stevens are mistaken. Justice Stevens unquestionably has the authority, as circuit justice, to stay the TRO. In *INS v. Legalization Assistance Project*, 510 U.S. 1301, 126 L. Ed. 410, 412 (1993) (O'Connor, J.), Justice O'Connor encountered an "exceptional case," like this one, that required a stay because the plaintiffs lacked a cause of action. Noting that the plaintiffs fell outside the zone of interests of the applicable federal statute, she found that the lower court's order was "not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." 126 L. Ed. at 414-15.

ORP's additional arguments concerning the lack of authority to stay the TRO are similarly unavailing. First, ORP suggests that this Court cannot, or should not, consider this stay because a TRO is a non-final order—but ORP is wrong, and wants to have it both ways. True, most TROs are non-final, but as everyone below agreed, TROs such as this one, which have permanent effects and thus are non-reviewable,

are reviewable in circuit courts. If the order was final for appellate review below, it is final for further review here, as this Court's jurisdiction, as to finality, derives from the appeals court's. *See Mc-Graw Hill v. Procter & Gamble*, 515 U.S. 1309 (1995) (Stevens, J.) (finding jurisdiction doubtful when circuit court had found jurisdiction lacking).

Second, ORP is equally mistaken in suggesting that a separate certiorari petition was required, and to the extent that a likelihood of certiorari is part of the likelihood of success assessment, the Secretary meets that test. First, the Court does not require stay applicants formally to file a certiorari petition, and it treats stay applications, when necessary, as incorporating that element. *See Purcell*, 127 S. Ct. at 6 ("We construe the filings of the State and the county officials as petitions for certiorari; we grant the petitions; and we vacate the order of the Court of Appeals."). Second, the Secretary showed in her Application the importance of the questions at issue, both in their effects here and on the broader question of whether HAVA is enforceable by private suits under Section 1983. Those recurring issues—as shown by the election-related litigation, much of it HAVA-related, that now repeats itself every election cycle—do warrant certiorari review, and thus meet the Court's test for assessing the likelihood of certiorari. See *Gregory-Portland Independent Sch. Dist. v. United States*, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers) (explaining that a Circuit Justice, in considering a stay application, is "to determine whether four Justices would vote to grant certiorari, to balance the so-

called 'stay equities', and to give some consideration as to predicting the final outcome of the case in this Court").

Finally, ORP suggests that the en banc nature of the decision below undercuts the need for the Court's review, but the opposite is true, and ORP's attempt to have it both ways is telling. ORP seems to suggest that this Court should be less willing to review an appeals court's decision reviewing a TRO when the appeals court sat en banc. But the reverse is true: Although en banc review and certiorari review are different animals, they are similar enough that cases meeting the test for the one are at least fair game for the other. Review of a garden-variety TRO should have ended with the panel. But ORP insisted that the issue was so important that it justified even *initial* en banc review, and then en banc rehearing after the panel ruled against it. Those same factors counsel in favor of this Court's consideration. ORP suggests that the issues here could tip the balance in Ohio's elections, and if that is true, it cuts both ways.

B. The district court abused its discretion in considering a claim that came too late, and that ORP had no right to bring.

ORP objects that the Secretary is circumventing the district court's discretion to modify the TRO. On the contrary, tonight the Secretary is asking the district court to modify the TRO. Since the district court issued the TRO, the Secretary and her staff have worked diligently with the Ohio Bureau of Motor Vehicles ("BMV"), Ohio's boards of elections, and other state agencies to comply with the TRO. The Secretary is returning to the district court only after gathering enough information to have a good faith basis for requesting the TRO's modification. Based on the

Secretary's estimates, her extension motion will request more than an additional week for compliance.

ORP adds that, as facts change or develop, the Secretary can return to the district court again and again for TRO modifications. Opp. at 10. But creating and changing election rules and procedures through court orders creates chaos. *See Purcell*, 549 U.S. at 7. In addition, this scenario (of repeated modification requests) risks continuous litigation: If the district court grants a modification, ORP may appeal; if the district court denies a modification, the Secretary may appeal. Finally—and most important—Art. II, §1, cl. 2 of the U.S. Constitution entrusts *States* to run elections. And HAVA respects this balance by permitting States to choose various methods of compliance. *See* 42 U.S.C. § 15485. Yet, under ORP's solution, *a federal judge* will run Ohio's election. Ohio's state election officials will be continually waiting for court rulings, rather than following the election procedures the Ohio General Assembly and the Secretary have promulgated.

In any event, ORP's arguments about the district court's discretion to modify the TRO misses the larger point: that this TRO never should have been entered in the first place, for several reasons.

For one thing, ORP came to the courthouse too late. ORP excuses its tardiness by asserting "that the Ohio voter registration database operated in precisely the way plaintiffs argue it should operate until the Secretary herself changed her policy '[f]or reasons that the record does not reveal and at a time the record does not reveal.'" Opp. at 11 (quoting 6th Cir. En Banc Op.). This statement

is patently false. The Secretary has repeatedly explained that she did not change this feature of the database—her predecessor did. That is why the record is "silent" on when the Secretary made the change—*because she never did*. ORP, which bears the burden, has introduced no evidence to rebut that truth, and ORP therefore has no excuse for their eleventh-hour filing.

In repeating this falsity, ORP relies heavily on the en banc Sixth Circuit's opinion. But the en banc court, like ORP, was simply wrong on this fact, just as the en banc court was wrong on other facts. For good reason: In this hurried and harried process, sufficient time has not existed to allow careful factfinding. And that is precisely why a TRO here was imprudent—because, as this Court warned in *Purcell*, electoral processes should not be enjoined on the basis of scant or nonexistent factual records. *Purcell*, 127 S. Ct. at 8 (Stevens, J., concurring).

On the equities, ORP still has not shown *any* likelihood of success on the merits of its HAVA claim, because ORP has no private right of action here.[1] ORP claims that the difference between HAVA section 302 and HAVA section 303 is "a distinction without a difference." But as the Secretary explained in her stay application, the distinction is a meaningful one that Congress itself created. Even assuming that the Sixth Circuit was correct in *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam), section 302 and section 303 are about two different things: provisional ballots on the one hand, and statewide

[1] ORP, in saying that private enforcement is not an "ultimate issue" in this case, Opp. at 6, seems to suggest that it is no issue at all. But this critical threshold issue is inherently part of the likelihood-of-success inquiry. After all, a party cannot succeed if it has no cause of action, just as it cannot succeed without standing—and a stay is therefore warranted. See *Legalization Assistance Project*, 126 L. Ed. at 412 (O'Connor, J.).

computer databases on the other. Congress sensibly chose to allow individuals to sue to gain access to ballots, but not to force state officials to exercise their discretion in particular ways in administering their statewide databases.

The fact that ORP is not at all likely to succeed on the merits is precisely why this Court should stay the TRO. The district court and the en banc Sixth Circuit, at ORP's urging, have changed the status quo on the merits of a critically important matter under HAVA—the Secretary's consistent administration of the statewide database. Were this matter presented in a more orderly proceeding, the courts would never have reached the merits of ORP's HAVA claim, because ORP so plainly lacks a right of action. Yet, bizarrely, ORP in this hasty case has *succeeded* in reaching the merits of its HAVA claim. That outcome is an abuse of the federal courts.

C. The Secretary—but not ORP—has shown irreparable harm.

As an initial matter, the ORP maligns the Secretary's public statement issued after the en banc decision—that she was working to comply with the TRO—as a concession that emergency intervention is not required. Opp. at 9. On the contrary, the Secretary has an affirmative duty to comply with the TRO until it is vacated. *See Walker v. Birmingham*, 388 U.S. 307, 314 (1967). Consistent with this obligation, the Secretary immediately directed her staff to begin attempting the necessary database modifications shortly after the district court issued its order on October 10, 2008. These preparations continued during proceedings before the Sixth Circuit, including the four-day period during which the TRO had been stayed.

and continue at this late hour. Were the Secretary to do or say otherwise, she would risk a contempt citation.

ORP next attacks the Secretary's failure to present evidence of the injury and disruption that will befall the electorate should she comply with the TRO. As the Secretary explained in her stay application, the door to the courthouse was not opened at the TRO stage. The district court did not allow the Secretary to put forward any live evidence about the statewide voter database, even as the court repeatedly demanded specific facts about its operation from counsel. And although the court "in no way limited the Secretary's ability to present as much documentary evidence as she wanted," Opp. at 10, ORP's shifting theories did. The Secretary prepared her arguments, and the accompanying affidavits, in response to ORP's original allegation—that the database did not perform *any* matching with BMV records. The theory then changed during the course of the TRO hearing—the database performed its matching function, but did not do so in an effective manner.

Finally, ORP attacks the Secretary's well-founded concerns about the destabilizing nature of the TRO on the upcoming election, likening it to those arguments rejected by this Court in *Crawford v. Marion County Elections Board*, 128 S. Ct. 1610 (2008). But in *Crawford*, the plaintiffs sought a court order *preventing* state officials from enforcing a state statute—a voter identification requirement. Here, the plaintiffs seek a court order requiring state officials to take *affirmative* steps. There, the litigation occurred at a steady pace; officials had ample time to implement the requirements of the statute and train their workers.

Here, the district court issued its TRO less than a month before the election, with no regard for its consequences.

On substance, ORP downplays the potential impact of the TRO on the election: "[T]he TRO simply requires the Secretary to provide the HAVA 'mismatches' to the county boards of election in a format they can use to verify voter registration before counting ballots." Opp. at 12. Yet, the question for the Secretary—and, ultimately, for the courts—is what the 88 county boards of election will do with that information once it is released. The database will not inform the county boards on whether a particular mismatch is an actual discrepancy, or the result of a typographical error. Nor is there any uniform process in place governing the use of that information—must the voter be notified of a discrepancy, when can a board require her to submit further information, and under what standard can a board drop a particular voter from the rolls. State and local officials cannot be expected to implement such measures on the fly as Election Day nears.

The Secretary is of course not averse to improving the functionality of the statewide voter database in the manner ordered by the district court. Had ORP approached the Secretary, or even filed its suit, earlier, these matters could have been resolved outside of the courtroom using a careful deliberative process. Rather, ORP waited to complain at the eleventh hour—when the Secretary, her staff, and the local officials are focused on other pressing election season matters. This request for judicial intervention is exactly the type of circumstance condemned by

Purcell, HAVA (42 U.S.C. § 15485), and the traditional deference afforded by federal courts to state officials in conducting elections.

Finally, as to HAVA, ORP is simply wrong. The Secretary has complied with the plain language of 42 U.S.C. § 15483(a)(5)(B)(i). She has created a system to share and match information in the statewide database with information in the BMV's database, and she provides the county boards of election—those entities responsible for registering voters and investigating complaints of fraud—with ready access to that system. Local officials can query a voter's match status in the statewide database for any reason at all and respond accordingly when a mismatch is reported.

CONCLUSION

The Court should grant the request for an emergency order staying the temporary restraining order.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JENNIFER BRUNNER, Secretary of State of Ohio, *Applicant*,

v.

OHIO REPUBLICAN PARTY, *et al*, *Respondents*.

a Application for Stay from the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANT AND TO FORMAT BRIEF UNDER RULE 33.2 BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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MOTION TO FILE *AMICUS CURIAE* BRIEF AND TO FORMAT BRIEF UNDER RULE 33.2

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Service Employees International Union ("SEIU"), Ohio AFL-CIO, and District 1199, Health Care and Social Service Union, SEIU respectfully request leave to file the accompanying brief as *amici curiae* in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. Counsel for Applicant and Respondents have consented to the filing of this *amicus* brief.

Amici also respectfully seek leave to format this brief in accordance with Supreme Court Rule 33.2 rather than Supreme Court Rule 33.1 due to the urgency of the pending matter. The Secretary of State's motion was filed after business hours on October 15, 2008 and the temporary restraining order that the Secretary seeks to stay requires compliance by October 17, 2008. *Amici* are unable to prepare this brief in accordance with Rule 33.1 in time to permit this Court's consideration.

Amicus curiae the AFL-CIO is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

Amicus curiae the SEIU is an international union with 2 million members including tens of thousands in Ohio. SEIU engages in voter registration, education and other election-related activities within Ohio and throughout the rest of the country on behalf of its members.

Amicus curiae the Ohio AFL-CIO represents 1,600 local unions across Ohio from 48 different international unions. The local unions that comprise the Ohio AFL-CIO represent approximately 650,000 working men and women, and some 300,000 union retirees. The Ohio AFL-CIO works to bring economic and social justice to the workplace and to the lives of

working Ohioan men and women. To this end, the Ohio AFL-CIO engages in voter registration, education and other election-related activities.

Amicus curiae District 1199 is a local union affiliated with the Service Employees International Union. District 1199 represents approximately 28,000 health care and social service workers in Ohio, Kentucky, and West Virginia. District 1199's Constitution expressly provides that one of the organization's purposes is "to maintain, preserve and extend the democratic process and institutions of our country." District 1199 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members.

Amici represent members who have registered to vote in Ohio in the upcoming general election, and *Amici* have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed a separate *amicus* brief in this case in the Sixth Circuit, in support of the Secretary of State's request to stay the temporary restraining order at issue here, and an *amicus* brief in the District Court, in opposition to a separate request for a temporary restraining order.

For good cause shown, *Amici* respectfully submit that the Court should grant the motion for leave to file the amicus brief filed herewith, formatted according to Rule 33.2.

Dated: October 16, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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INTEREST OF *AMICI CURIAE*

Amicus curiae the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

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No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Amici represent members who have registered to vote in Ohio in the upcoming general election and have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed two *amicus* brief in this case, one in the U.S. District Court for the Southern District of Ohio and one in the U.S. Court of Appeals for the Sixth Circuit.

Counsel for *Amici* gave timely notice of intent to file this brief to Counsel of Record for Applicant and Sixth Circuit counsel for Respondents on October 16, 2008. Counsel for Applicant and Respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court should grant the Secretary of State's Application for a Stay of a Temporary Restraining Order because its precedent forecloses Plaintiffs from enforcing the statutory provision at issue via 42 U.S.C. §1983. Under this Court's authority, Congress' phrasing of the statutory provision at issue as imposing obligations upon government officials shows that the provision does not grant any individual rights, and the lower courts erred in focusing on the Congressional Act as a whole rather than the specific statutory provision at issue.

ARGUMENT

Amici curiae submit this brief in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. *Amici* write separately here to offer two additional reasons why this Court's precedent clearly forecloses reliance on Section 1983 to enforce the provision of the Help America Vote Act ("HAVA") at issue: first, because the provision at issue imposes obligations upon government officials rather than conveying any rights; and second, because the required inquiry focuses on the specific statutory provision at issue rather than the Congressional Act as a whole.

In this Court's precedent, the majority of the *en banc* U.S. Court of Appeals for the Sixth Circuit unsurprisingly could not bring itself to hold the statutory provision at issue enforceable via Section 1983, but instead sought to evade the applicable precedent by stating simply that the argument "raises a difficult issue" and that "[t]he 'close' answer to this question, together with the reality that all of the other risks of error support the plaintiffs, weigh in favor of denying the Secretary's motion to stay the TRO." *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008). But the issue is not difficult, and the answer is not close. There is no privately enforceable right here, and so no temporary restraining order should have issued.

1. As the Secretary of State has explained in her Application for a Stay of a Temporary Restraining Order, the HAVA provision at issue contains no rights-creating language; rather, at most, it imposes mandates upon state officials. That provision reads in full:

> Sharing information in databases. The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

42 U.S.C. §15483(a)(5)(B)(i).

This Court has made it clear that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted).[2] Thus, statutes that "have an aggregate focus" in that they "speak only in terms of institutional policy and practice" do not confer a right enforceable via Section 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (internal quotation marks omitted); *see also id.* (statutory "provisions

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[2] The inquiry to determine whether a statute confers enforceable rights is no different in an implied private right of action case (such as *Alexander*) than in a Section 1983 case. *See Gonzaga University v. Doe*, 536 U.S. 273, 283-285 (2002).

[at issue] further speak[s] only in terms of institutional policy and practice, not individual instances of disclosure. . . . Therefore, as in *Blessing*, they have an aggregate focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights") (internal quotation marks and citations omitted); *Blessing v. Freestone*, 520 U.S. 329, 343 (1997) ("Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.") (empahses in original).

Here, there can be no question but that the statute at issue focuses on the persons regulated – "[t]he chief State election official and the official responsible for the State motor vehicle authority" – and requires them to enter an agreement. There is no mention of the individuals benefited by this statute, much less an unambiguous conveyance of rights to such individuals. That alone forecloses Plaintiffs' claim, and renders the grant of the temporary restraining order an abuse of discretion.

Surprisingly, the Sixth Circuit asserts that it is an open question whether "*Gonzaga* requires individual-rights-granting language even when there is no individual to whom such language could apply" because the class of persons benefited is as broad as all voters. *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 7 (6th Cir. Oct. 14, 2008). But this Court has made it clear that a private right may be implied only when the statute identifies "a class for whose *especial* benefit the statute was enacted." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (emphasis in original); *see also id.* at 294 ("Here, the statute states no more than a general proscription of certain activities; *it does not unmistakably focus on any particular class of beneficiaries* whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.") (emphasis added).

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"[T]he questio. /hether Congress . . . intended to create a private right of action is definitively answered in the negative where a statute by its terms grants no private rights *to any identifiable class*." *Gonzaga*, 536 U.S. at 283-284 (emphasis added; internal brackets and quotation marks omitted); *see also id.* at 285 (key question is "whether or not Congress intended to confer individual rights upon a *class* of beneficiaries") (emphasis added). The Sixth Circuit's proposal that statutes that benefit the public in general have a special claim to enforcement through Section 1983, while a statute that benefits an identifiable class would not, simply turns the inquiry established by this Court on its head, in defiance of precedent, logic, and common sense.

2. In the face of this clear precedent, the Sixth Circuit majority and the District Court proposed a different inquiry: not whether the statutory provision at issue conveys rights, but whether HAVA as a whole does so. *See Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008) (saying it would be "oddity" if Congress meant to permit private individuals to enforce provisional ballot sections of HAVA but not HAVA's "anti-fraud provisions"); *Ohio Republican Party et al. v. Brunner*, No. 2:08-CV-00913 at 7 (S.D. Ohio Oct. 9, 2008) (holding prior Sixth Circuit holding that HAVA's provisional ballot provision may be enforced through Section 1983 dispositive on question whether provision at issue may also be so enforced).

But this Court long ago foreclosed such an approach. In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court reversed a lower court's determination that Title IV-D of the Social Security Act creates an enforceable right. The decision explains that the lower court had "paint[ed] with too broad a brush" in holding Title IV-D created such rights "[w]ithout distinguishing among the numerous rights that might have been created by this federally funded

welfare program." *Id.* 342. Instead, this Court instructed, courts must focus on the specific statutory provisions and rights at issue, as had been its approach in numerous prior cases:

> In *Wright*, for example, we held that tenants of public housing projects had a right to have their utility costs included within a rental payment that did not exceed 30 percent of their income. We did not ask whether the federal housing legislation generally gave rise to rights; rather, *we focused our analysis on a specific statutory provision* limiting "rent" to 30 percent of a tenant's income. Similarly, in *Wilder*, we held that health care providers had an enforceable right to reimbursement at "reasonable and adequate rates" *as required by a particular provision* in the Medicaid statute. . . . Finally, in *Livadas*, we discerned in the structure of the National Labor Relations Act (NLRA) the very specific right of employees "to complete the collective-bargaining process and agree to an arbitration clause." We did not simply ask whether the NLRA created unspecified "rights."

Blessing, 520 U.S. at 342-43 (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1990); *Livadas v. Bradshaw*, 512 U.S. 107 (1994)) (emphasis added; internal citations and parentheticals omitted). Here, similarly, this Court must decide whether 42 U.S.C. §15483(a)(5)(B)(i) – not HAVA as a whole – gives rise to enforceable rights. Plaintiffs and the lower courts offer no plausible reading of the language of that provision that would support such a determination.[3]

3. When, as here, the district court's reasoning so clearly contradicts the instruction of the Supreme Court, such error alone is sufficient reason to grant a stay. *See, e.g., Pacileo v. Walker*, 446 U.S. 1307, 1310 (Rehnquist, Circuit Justice 1980) (granting stay because "the [challenged] order . . . is very much at odds with principles set forth in [Supreme Court cases]").[4]

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[3] Because it is clear that the statutory provision at issue does not create an unambiguous right, there is no need to ask whether the existence of an alternative enforcement mechanism shows that Congress meant to preclude a remedy for the right at issue. *See Gonzaga Univ.*, 536 U.S. at 284-85 & n. 4.

[4] As the Secretary of State explained, the Plaintiffs' delay also weighs strongly against the grant of equitable relief. *See Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (setting forth elements of defense of laches). In addition to the Secretary of State's detailed explanation as to why the delay was unjustified, *Amici* point out that the Sixth Circuit's suggestion that Plaintiffs' delay in filing was attributable to efforts to resolve election disputes out of court not only finds no support in the record but also is belied by evidence that at no time did a representative of Plaintiff Republican Party contact the Secretary of State's office even to inquire about the State's

CONCLUSION

For the reasons discussed, the Secretary's Application for a Stay of a Temporary Restraining Order should be granted.

Dated: October 16, 2008

Respectfully submitted,

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methods for matching data under HAVA, even though HAVA was passed in 2002, the Secretary of State signed a memorandum of understanding with the state Bureau of Motor Vehicles regarding information sharing in 2004, and the manual on which Plaintiffs base their claims was released in January 2008. Farrell Affidavit (D.Ct. Dkt. Nos. 44-9, 44-10) ¶¶8, 10, Ex. A; Maragos Affidavit (D.Ct. Dkt. No. 44-1) ¶5.

By: _____
Stephen P. Berzon

(5)

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OCT 17 2008
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No. 08 A 332

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER BRUNNER, OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, RHONDA L. COLVIN AND C. DOUGLAS MOODY,
Respondents.

ON APPLICATION FOR A STAY
FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE SUPPORTING APPLICANT AND MOTION FOR LEAVE TO FILE IN TYPEWRITTEN FORMAT BY THE ACLU OR OHIO, PROJECT VOTE, NORTHEAST OHIO COALITION FOR THE HOMELESS (NEOCH), 1MATTERS, AND DANIEL GEORGE

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To the Honorable John Paul Stevens, Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

1. **Motion for Leave to File In Typewritten form.** Amici curiae American Civil Liberties Union of Ohio (ACLU of Ohio), Project Vote, Northeast Ohio Coalition for the Homeless (NEOCH), 1Matters, and Daniel George hereby move this Court for an order permitting the filing of the attached *amicus* brief in support of the application for a stay and for leave to file in typewritten format in conformity with Rule 33.2 of this Court. Amici believe the exigencies of the underlying litigation which involves the preparation of Ohio's statewide voter registration list in preparation for the November 4, 2008 general election makes it an appropriate case to file this typewritten submission.

2. **Amici and Their Interests.** *Amici* have previously participated in this litigation, submitting briefs in the district court and the court of appeals supporting the position of the Secretary of State. Three of the *amici*, Project Vote, NEOCH, 1Matters, and Daniel George, are plaintiffs in *Project Vote, et al. v. Madison County, et al.* (N.D. Ohio Case No. 08-cv-2266), 2008 WL 4445176(order of Sept. 29, 2008, issuing temporary restraining order), currently pending in the U.S. District Court for the Northern District of Ohio concerning issues related to those presented here. *Amici* believe that their brief will address issues that may not be addressed by other parties and therefore assist this Court in its determination of the Secretary of State's application.

3. *Amici* are as follows:

a. The American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU of Ohio has been active in defending the equal right of all citizens to participate in the electoral process. The ACLU of Ohio has nearly 30,000 supporters and members statewide. The ACLU of Ohio has sought to protect the voting rights of citizens in Ohio and has provided representation to plaintiffs in numerous voting cases involving electoral processes, including several cases on behalf of Ohio voters, namely *Stewart v. Blackwell*, 5:02-cv-02028 (N.D. Ohio); *Boustani v. Blackwell*, 1:06-cv-02065 (N.D. Ohio); *ACLU of Ohio v. Brunner*, 1:08-cv-00145 (N.D. Ohio); and *ACLU v. Taft*, 02-00766 (S.D. Ohio).

b. Project Vote is a non-partisan, non-profit 501(c)(3) organization incorporated in Louisiana, with headquarters in Washington, D.C, and an Ohio office located at 23556 Marion Rd. North Olmsted, Ohio 44114. The mission of Project Vote is to strengthen American democracy by ensuring broad participation in the country's civic life. It does this by trying to facilitate the registration and participation of as many eligible American voters as possible. In particular, it seeks to promote political involvement by minority and low-income voters, whose voices we believe are marginalized in the current political process. Among other programs to enhance participation in American democracy, it conducts a Voter Participation Program, as part of which to assist as many eligible Americans to register and to

vote as possible. Project Vote has litigated issues affecting voter participation in Ohio including *Project Vote v. Blackwell*, U.S. District Court, N.D. Ohio *(Case 1:06-cv-01628-KMO)*.

c. The Northeast Ohio Coalition for the Homeless (NEOCH) is a non-profit, non-partisan membership organization located in Cleveland, Ohio and serving the needs of the local homeless community. NEOCH provides services to approximately 20,000 homeless people each year. NEOCH's mission is to organize and empower homeless and at risk men, women and children to break the cycle of poverty through public education, advocacy and the creation of nurturing environments. One of NEOCH's goals is to work to assure that all homeless people are registered to vote, and reduce barriers to registering and homeless people actually voting. NEOCH has administered non-partisan voter registration and get out the vote efforts among homeless people since its founding in 1989.

d. 1Matters is a non-profit volunteer member organization that serves the homeless community in Lucas County, Ohio. 1Matters has approximately 300 members. One of the primary roles of 1Matters is advocacy, working on building the capacity of the homeless to not only have a seat at the table, but to have a voice at that table. A major initiative to that end is 1Votes - assisting with voter registration, verifying and updating registration, requesting absentee ballots, providing transportation to take advantage of early voting, and providing volunteers to accompany voters overcome barriers. 1Matters plans to assist area homeless voters with early voting up until the November 4, 2008 election. 1Matters

expects to bring at least 500 homeless individuals and volunteers to vote early this year.

e. Daniel Robert George is a resident and registered voter in Cuyahoga County, Ohio. He is the volunteer organizer of a program to help elderly individuals and those residing in assisted living care centers to register to vote and request absentee ballots for the November 4, 2008 election.

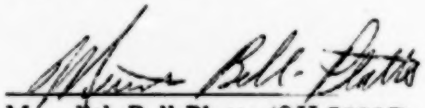
4. Counsel for *amici* are authorized to state that counsel for applicant Brunner and counsel for respondent Ohio Republican Party have consented to the filing of the attached brief.

WHEREFORE, PREMISES CONSIDERED, *amici respectfully pray for orders*

(a) granting leave to submit the this motion and the attached brief in typewritten form and

(b) granting leave to file the brief, amicus curiae on behalf of the above named amici.

Respectfully submitted,



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No. 08 A 332

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER BRUNNER, OHIO SECRETARY OF STATE,
Applicant,

v.

OHIO REPUBLICAN PARTY, RHONDA L. COLVIN AND C. DOUGLAS MOODY,
Respondents.

ON APPLICATION FOR A STAY
FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE ACLU OF OHIO, PROJECT VOTE, NEOCH, 1MATTERS, AND DANIEL GEORGE IN SUPPORT OF APPELLANT'S APPLICATION FOR A STAY OF A TEMPORARY RESTRAINING ORDER

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INTRODUCTION[1]

This matter is before the Court on an application for a stay of an order of the United States Court of Appeals for the Sixth Circuit, which affirmed a temporary restraining order entered by the United States District Court for the Southern District of Ohio. The TRO, entered less than three weeks remaining before the November 4, 2008 election, has raised substantial doubt as to whether thousands of Ohio residents who validly registered to vote since January 1, 2008 will be able to cast ballots that will be counted in the November 4, 2008 general election. In a sharply divided 9-7 opinion, the Sixth Circuit Court of Appeals has declined to stay this injunction.

The temporary restraining order, as well as the Sixth Circuit opinion are premised on a faulty understanding of the requirements of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq*. At issue is whether HAVA requires that states utilize computer database matching, an inexact and error-prone process, to verify the voting eligibility of persons who are registered to vote and whose eligibility is otherwise unquestioned.

The temporary restraining order requires that the Ohio Secretary of State immediately identify all voter registration records that the state computer, for whatever reason, is unable to match up with a record for the same individual contained in the state's driver's license database or the Social Security

[1] No counsel for any party authored this brief in whole or in part nor made any monetary contribution intended to fund the preparation or submission of this brief.

Administration database. Thereafter, according to the TRO, the Ohio county boards of election are to "take appropriate action" with regard to the unmatched registrants.[2] Although the TRO does does not explicitly state what that action should be, the district court, in its Opinion, concluded that HAVA "requires matching for the purpose of verifying the identity of the voter before counting that person's vote." 6th Cir. En Banc Op. at 11. Thus, the order places fully qualified voters at risk of being purged and precluded from voting in the November election because of the inability of election officials to establish matches between two databases. Accordingly, the TRO may lead to the disfranchisement of thousands of Ohio residents, many of whom voted without hindrance in Ohio's presidential primary earlier this year.

The en banc opinion of the Sixth Circuit has only further confused the situation. On the one hand, the court left the TRO, as written by the district court, in full effect and fully supported the district court's conclusion that database matching appropriately may be used to verify voting eligibility. On the other hand, the court appears to have effectively atomized HAVA implementation in the State, specifying that every county is free to decide on its own whether to verify voter eligibility using lists of unmatched registrants provided to them by the Secretary of

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[2] The temporary restraining order fails to comply with the requirements of Rule 65. As this Court has repeatedly held, "... the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Specificity is required: "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.*

State. As the court stated: "All this order does is ensure that county boards may, *if they wish*, investigate voter registration discrepancies . . . – in part by using the SWVRD [the statewide registration database] (or information already derived from that database)." 6th Cir. En Banc Op. at 10 (emphasis added).

The opinions of the courts below fundamentally misconstrue the requirements of federal law, in three ways. First, HAVA does not require that database matching be utilized to determine whether registration applicants are eligible to vote. Although HAVA does include a limited database matching provision, that provision was included generally to enable states to address the different and unrelated problem of duplicate registration entries for the same individuals. Second, HAVA specifically requires that each state implement its registration list in a uniform manner throughout the state, not on a county-by-county basis. Moreover, different verification practices in different counties raises substantial concern under this Court's ruling in *Bush v.* Gore, 531 U.S. 98 (2000). Third, federal statutes impose specific restrictions on the authority of states to remove persons from the registration rolls, so as to ensure that persons who are eligible to vote, and are registered to vote, are not mistakenly deleted from the rolls. By setting in motion a process by which unmatched registrants may be precluded from voting, the district court's order will effectively remove these individuals from the registration rolls for purposes of the November 4 election. The removal restrictions enacted by HAVA and the National Voter Registration Act ("NVRA"), 42 U.S.C.§ 1973gg *et seq.*, do not permit such removals to occur. Therefore, even if the

Sixth Circuit were correct in its interpretation of HAVA, any meaningful use of the no-match information would violate the NVRA. Thus, the relief ordered by the district court and affirmed by the Sixth Circuit will place the State of Ohio in violation of HAVA and the NVRA.

Accordingly, *amici* respectfully urge this Court to grant the Secretary's application for a stay of the district court's temporary restraining order.

ARGUMENT IN FAVOR OF A STAY

I. THE DISTRICT COURT'S ORDER LEADS TO A RESULT THAT IS CONTRARY TO THE PURPOSE OF HAVA AND WOULD LIKELY VIOLATE EQUAL PROTECTION.

In 2002, Congress enacted the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.*, to respond to the serious problems with the administration of elections revealed by the 2000 presidential election. *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). The heart of HAVA's voter registration reform effort is the requirement that states create a single, uniform, statewide database of all registered voters. 42 U.S.C. § 15483(a)(1)(A). While Congress believed the database would probably prevent fraud, this was NOT their intent in creating the requirement. Prevention of fraud was at best an ancillary benefit to Congress's primary goal to prevent people from being incorrectly purged from the voting rolls. The district court's order and the en banc decision fail to recognize this purpose of Congress in enacting HAVA's database requirement. Furthermore, ordering all computer database matching data to be handed over to the counties "take appropriate action" flies in the face of Congress's purpose of

creating a *uniform* statewide list consistent with the NVRA requirement that any program to ensure accurate voter registration "be uniform." 42 U.S.C. § 1973gg-6(b)(1). The TRO could lead to the very Equal Protection problems found in *Bush v. Gore*, 531 U.S. 98 (2000) that it was designed to avoid.

The temporary restraining order mandated that the Secretary to share all mismatch data with the counties by the end of this week. It is silent as to what the counties may or may not do with the data. That creates a potential Equal Protection issue if each county board of election (Ohio has 88) can do what it wants with the mismatch data. Creating the potential for upwards of eighty-eight different treatments of the mismatch data is completely contrary to HAVA's stated goal of a *uniform* system to ensure that eligible voters are not wrongly removed because of mistakes in numerous different systems.

Furthermore, if the various county boards of elections do utilize the mismatch data in different ways to remove voters or require alternate provisional balloting, that could trigger the same mishandling concerns that led to this Court's having to intervene in *Bush v. Gore*, 531 U.S. 98 (2000).

Allowing the lower court's order to remain in effect would frustrate the mandate and goals of HAVA. Therefore, this Court should grant an emergency stay of the order below.

A. Congress' purpose in enacting HAVA was not exclusively to prohibit fraud, but also to ensure that all eligible voters would be able to vote and would not be improperly purged from the registration lists, and the prevention of fraud was an ancillary benefit not a primary goal.

In the aftermath of the 2000 election, Congress sought to craft a law to avoid a repeat of the many problems that surfaced in that election by enacting the aptly titled Help America Vote Act.[3]

One of the many reforms mandated was the creation of a uniform, statewide, computerized database to catalog all registered voters. 42 U.S.C. § 15483(a)(1)(A). Contrary to the Sixth Circuit holding and Ohio Republican Party's assertion, this database was designed to prevent voters from being unable to cast ballots due to confusion or errors by local election officials. The goal was to harmonize the numerous and often conflicting local voter rolls.

The U.S. House of Representative Report on HAVA bears out that, while Congress believed the system would probably prevent fraud, this was not the exclusive intent. The report reflects Congress's intent to prevent people from being incorrectly purged.

In explaining the minimum standards, the House initially notes why it is establishing a requirement for a statewide registration database.

The Minimum Standards are:

> (1) The State will implement a Statewide voter registration system networked to every local jurisdiction in the State....

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[3] Amici assert the title is instructive as to the law's intention: to help people vote. It is telling that Congress did not choose to name it the "Help America Avoid Fraud Act" or the "Fraud Prevention Act," as that was not their primary purpose in enacting the law.

Creation of such a system will make the registration lists more accurate, and easier to update. *It should reduce the incidence of voters appearing at a polling place only to discover that no record of their registration can be found.* When voters move from one jurisdiction to another within that state, the statewide system will be able to track that movement. If for some reason a voter remained registered at their old address, the election officials will be able to see that and take corrective action. Requiring states to develop statewide databases will modernize and improve registration nationwide.

People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income groups, who are more likely to move than higher-income groups within the same state.

The minimum standard requires states to create a single database that is official, centralized and administered at the state level. Databases which simply link existing local databases do not qualify as satisfying this requirement. Multiple databases linking various vendor or local government programs to a statewide system is not sufficient to satisfy this requirement. *The intent of the minimum standard is to establish one database that is identical and is the same program throughout the state and local jurisdictions* so that all training can be uniform, all records requirements are identical, and that the state has full authority for maintenance and quality matters related to the database. The intent is also to assure that there are not jurisdictional nor vendor issues in terms of operability, problem resolution, or other types of reasons for one part of the system not matching the other.

It is likely that states will find it necessary to create a unique identifier to distinguish registered voters who happen to have the same name and/or birth date. The unique identifier so created *will be used to assure that list maintenance functions are attributable to the correct voter; so as to avoid removing registrants who happen to have the same name and birth date as a felon, for example....*

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p.27 (emphasis added).

Second, the House notes the importance of maintaining accurate registration rolls to ensure that all eligible voters are able to cast a ballot.

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> ...(B) *Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.*
>
> States must ensure that their registration list is accurate and is updated regularly.
>
> Leaving ineligible voters on the rolls leads to a number of problems. It increases costs ... is a waste of vital resources ... [and] lead[s] to the public perception that the process can be easily manipulated. When ... ineligible voters are left on rolls indefinitely, it invites fraud...
>
> The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act. The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this law. Accordingly, H.R. 3295 leaves NVRA intact, and does not undermine it in any way.

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p.27-28 (emphasis added).

As the above passages indicate, Congress did recognize that the statewide registration database would help guard against voter fraud. However, fraud prevention was ancillary to the primary purpose of ensuring that all eligible voters were not wrongfully removed from the voting rolls. Respondents and the courts below emphasize voter removal undercutting the protection of voter access at the core of this part of HAVA.

This dual purpose is further supported by the United States Commission on Civil Rights' findings after the 2000 presidential election. The USCCR report states that "[r]ather than focusing efforts on purging lists, NCFER recommends that states undertake the objective of accurately registering every eligible voter." U.S. Commission on Civil Rights, Election Reform: An Analysis of Proposals and the Commission's Recommendations for Improving America's Election Systems, Ch. 3 (November 2001) available at http://www.usccr.gov/pubs/vote2000/elecref/ch3.htm. And, secondly, that a "statewide voter database would lessen the chance for fraud, particularly in jurisdictions that have a high percentage of ineligible voters on their lists, and make it less likely that voters will be wrongfully purged." *Id.*

B. HAVA's requirement for a statewide database was intended to create uniformity and consistency. The TRO could lead to results contrary to that goal and invites inconsistent application by 88 counties of what should be one voter registration list.

The district court asserts that its order was made necessary by the purported failure of the Ohio Secretary of State to comply with the database matching provisions of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 *et seq.* The court erred in what it held was required by HAVA.

HAVA instructs that states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B). But HAVA's "coordination" provision does not require that Ohio (or any other state) use database matching to determine whether persons who register to vote are eligible to

vote in elections. HAVA only requires states utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters and to enable states to more easily identify duplicate registrations. The relevant HAVA section, 42 U.S.C. § 15483, does not state that computer matching should be used to test the validity of a voter registration application.

The goal is uniformity. As the U.S. House report described it:

> The minimum standard *requires states to create a single database that is official, centralized and administered at the state level.* Databases which simply link existing local databases do not qualify as satisfying this requirement. Multiple databases linking various vendor or local government programs to a statewide system is not sufficient to satisfy this requirement. *The intent of the minimum standard is to establish one database that is identical and is the same program throughout the state and local jurisdictions* so that all training can be uniform, all records requirements are identical, and that the state has full authority for maintenance and quality matters related to the database. The intent is also to assure that there are not jurisdictional nor vendor issues in terms of operability, problem resolution, or other types of reasons for one part of the system not matching the other.

Committee on House Administration, Help America Vote Act, H.R. Rep. No. 107-329, at p. 27 (2001) (emphasis added).

The temporary restraining order and the *en banc* Sixth Circuit's decision focuses exclusively on the anti-fraud discussion and ignore this purpose. .

II. HAVA'S VOTER REGISTRATION REQUIREMENTS AVOIDED USING MATCHING AS A RELIABLE TEST OF ELIGIBILITY. THE PROBLEMS INHERENT IN COMPUTER MATCHING MAKE IT AN UNRELIABLE BASIS FOR REJECTING VOTES.

A. HAVA's Voter Registration Requirements

HAVA specifies various standards for creating and maintaining the statewide, computerized database, including three basic principles that must guide the states.

First, "the name of each registered voter [must] appear[] in the computerized list." 42 U.S.C. § 15483(a)(1)(B)(i). In order to ensure that this is accomplished, HAVA provides that "[a]ll voter registration information obtained by any local election official . . . shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official." 42 U.S.C. § 15483(a)(1)(A)(vi).

Second, "only voters who are not registered or who are not eligible to vote [may be] removed from the computerized list." 42 U.S.C. § 15483(a)(1)(B)(ii). In order to ensure that only ineligible voters are removed, HAVA includes specific restrictions on the authority of states to remove persons from the registration list. All states must provide "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 42 U.S.C. § 15483(a)(4)(B). In addition, in Ohio and other states covered by the National Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.*, ineligible voters may be removed under HAVA only "in accordance with the provisions of the National Voter Registration Act of 1993." 42 U.S.C. § 15483(a)(2)(A)(i).

Third, "duplicate names [must be] eliminated from the computerized list." 42 U.S.C. § 15483(a)(1)(B)(iii). To facilitate this, HAVA provides for a two-step maintenance system. States begin by assigning "a unique identifier [in the database] . . . to each legally registered voter in the State." 42 U.S.C. § 15483(a)(1)(A)(iii). The identifier is either: the registrant's driver's license number (supplied by the registrant on the voter registration application); the last four digits of the registrant's social security number, for those applicants without a driver's license (again supplied by the registrant on the registration application); or another number generated by the state, for those who lack both a driver's license and a social security number. 42 U.S.C. § 15483(a)(5)(A). Next, in order to make sure that the identifying numbers are correctly entered into the registration database, states must "coordinate" their voter registration database with the state driver's license database and the Social Security Administration database. 42 U.S.C. §§ 15483(a)(1)(A)(iv), 15483(a)(5)(B).

B. Computer Matching Does Not Provide a Reliable Means for Reviewing Voter Eligibility

Database matching is an inherently flawed process that routinely fails to identify records for the same individual that in fact are contained in both of the databases being compared. *See generally* Brennan Center for Justice, *Making the List: Database Matching and Verification Processes for Voter Registration*, available at http://tinyurl.com/66t6r8 (last accessed October 16, 2008). Accordingly, database matching does not provide a reliable means for reviewing voter eligibility.

Database matching often fails because of trivial data errors that prevent the computer from recognizing that the databases being compared actually do contain records for the same person. These errors include typos, data entry errors made when processing registration forms, use of married and maiden names in different databases, and inconsistent treatment of hyphenated or compound last names. *Id.*[4]

The end result is that database matching generates a high rate of putative "no matches." In the first six months of 2006, before its "no match, no vote" law was enjoined, the State of Washington's matching system had a failure rate of 16 percent statewide, with up to 30 percent in King County where Seattle is located.[5] Through April of 2006, 18 percent of applications in Los Angeles County did not yield a successful computer match.[6] Nearly 20 percent of an audit sample of 15,000 applications submitted in New York City in September 2004 could not be matched due to typos and other data entry errors.[7] And in the first three weeks after Florida renewed enforcement of its matching program (on September 8, 2008),

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[4] The former Commissioner of the Social Security Administration noted that matches with the social security database often fail because of "name change[s] after a marriage or divorce, . . . incomplete, transposed or missing names . . . in SSA records[ ] . . . [and] discrepanc[ies] created by use of multiple or compound names." *American Federation of Labor v. Chertoff*, No. 07-4472, Decl. of Kenneth S. Apfel, ¶ 7 (N.D. Cal. Aug. 29, 2007) *available at* http://tinyurl.com/4jbsbg. In November 2007, the Social Security Administration reported that of 2.3 million voter applications it had processed, nearly half -- fully 44.5% -- were not successfully matched. Pete Monaghan, SSA Help America Vote Act Powerpoint 14, Nov. 29, 2007, *available at* http://tinyurl.com/4dp663.

[5] *See Fla. NAACP v. Browning*, No. 07-402, Decl. of Andrew Borthwick, ¶ 17 (N.D. Fla. Sept. 17, 2007) ("Borthwick Decl."), *available at* http://tinyurl.com/4k69sm.

[6] *See Fla. NAACP v. Browning*, No. 07-402, Decl. of Conny McCormack, ¶ 13 (N.D. Fla. Sept. 17, 2007), *available at* http://tinyurl.com/4z66bc.

[7] *See* Borthwick Decl. ¶ 12 & Ex. F.

approximately 15 percent of attempted matches failed, keeping at least 5,000 voters off the registration rolls.[8]

Preconditioning registration and voting on successful matching is particularly problematic because failed matches occur more frequently among members of certain racial and ethnic groups. Latino citizens are susceptible to problems matching compound last names, and African Americans are frequently not matched because of their use of unique names, or derivative spellings of common names. Thus, for example, in Florida, under the matching program in effect in 2006 and 2007, Latinos constituted 15 percent of the total registration applications but 39 percent of those blocked due to a computer mismatch, and African American voters made up 13 percent of the applicants but were 26 percent of those not matched. White voters, on the other hand, constituted 66 percent of the applicant pool but only 17 percent of the mismatched applicants.[9]

C. The Courts Below Erred in Interpretting HAVA's Matching Requirement as a Voter Eligibility Requirement.

Contrary to the assertions of the Sixth Circuit or district court's orders, HAVA's database "coordination" provision does not require that Ohio (or any other state) use database matching to determine whether persons who register to vote are eligible to vote in elections. Instead, HAVA only requires Ohio (and other states) to

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[8] Aaron Dealatte and Mary Shanklin, *ID match law stalls 5,000 voter applications*, Orlando Sentinel, Oct. 1, 2008, *available at* http://www.orlandosentinel.com/news/local/state/orl-novote0108oct01,0,6794080.story.

[9] *See* Daphne Eviatar, *Florida 2000 Redux?*, Washington Independent, Oct. 1, 2008, *available at* http://tinyurl.com/4d5ux5.

utilize database matching for the limited purpose of ensuring that accurate identifying numbers are assigned to registered voters.

The HAVA section that addresses the obligation of each state to create and maintain a statewide registration database, 42 U.S.C. § 15483, does not include any language stating that computer matching should be used to test the validity of a voter registration application. The only provision cited by the courts below specifies that registration records should be compared with driver's license records "to the extent required to enable [state officials] to verify the accuracy of information provided on applications for voter registration." 42 U.S.C § 15483(a)(5)(B)(i). However, as demonstrated below, this language simply means that state officials should conduct computer matching in order to ensure that the correct driver's license numbers are entered into the registration database (so that they may be used, in turn, to weed out duplicate registrations). This language does not mean that computer matching should be used to verify the identity or qualifications to vote of Ohio residents who submit registration applications.

The lower courts' flawed reading of HAVA is demonstrated by the language of HAVA itself. Congress explicitly linked computer matching and voter eligibility with regard to one narrow group of voters, while not doing so with regard to voters in general. The affected group consists of those persons who register by mail and have not voted previously in an election for federal office in the voter's state. HAVA provides that these voters generally must provide certain documentary proof of identity at the time of registering or voting, but are excused from this requirement

if election officials are able to match their voter registration data with a driver's license record or a record that contains at least the last four digits of the registrant's social security number. 42 U.S.C. § 15483(b). Thus, Congress clearly understood that database matching potentially could be linked with voter eligibility, understood how to write specific language that links the two, and chose not to require such a link except with regard to a narrow group of voters.[10] Of critical importance, Congress mandated acceptable alternatives to matching numbers between databases. This alone establishes that matches should not be the touchstone for voter eligibility.

Moreover, the district court and Sixth Circuit's reading of HAVA have been specifically rejected by the two courts that previously have addressed the HAVA database matching provisions. In *Florida State Conference of the NAACP*, 522 F.3d at 1172, the Eleventh Circuit flatly stated that "[t]here is nothing at all in [HAVA] that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants" (as opposed to mail-in registrants who are first-time voters). Similarly, in *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006), the district court stated that "[i]t is clear from the language of [HAVA] and by looking at legislative history that HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on voter

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[10] It also should be noted that HAVA does not require any matching at all for registration applicants that lack a driver's license number or a Social Security number. 42 U.S.C. § 15483(a)(5)(A)(ii), and does not require matching in states that specify that voters must provide their full (and more reliably unique) Social Security number. 42 U.S.C. § 15483(a)(5)(D).

eligibility." The district court below sought to enlist the *Washington Ass'n of Churches* decision to its side, quoting that district court as saying that "'HAVA requires matching for the purpose of verifying the identity of the voter before casting or counting that person's vote.'" 6th Cir. En Banc Op. at 9. While this is an accurate quotation from the opinion, what the district court below failed to acknowledge is that the Washington district court was referring only to the narrow class of voters who registered by mail and are first-time voters, and did so to buttress its conclusion that HAVA does not require that states conduct database matching to verify voter eligibility for voter registrants in general.[11] The Sixth Circuit similarly misapplies *Washington*, stating that the case offers "no support for a contrary interpretation" to that of the district court. 6th Cir. En Banc Op. at p. 8.

The absence of any "database-matching, voter eligibility" requirement in HAVA (except with regard to the aforementioned narrow group of voters) means that the Secretary of State's actions do not raise any specter that persons ineligible to vote have been included in the state's voter registration database. Any assertion to the contrary is simply unsupported.

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[11] Both cases dealt with challenges to state statutes (in Florida and Washington, respectively) that specified that in order to successfully register to vote in the state, state officials had to first match the applicant's voter registration record with a state driver's license record or a Social Security Administration record. Plaintiffs argued that this linkage was prohibited by HAVA on the ground that HAVA does not include any such requirement and preempts state law on this subject. The Eleventh Circuit held that HAVA is not preemptive and that Florida was permitted – but, significantly, was not required – to create this linkage, *Florida State Conference of the NAACP*, 522 F.3d at 1167-1172, while the District Court for the Western District of Washington found HAVA to be preemptive. *Washington Ass'n of Churches*, 492 F. Supp. 2d at 1269-70. Since the interpretation of HAVA by the courts below is faulty regardless of whether HAVA is deemed to be permissive or preemptive, this Court need not resolve the preemption question and we do not address that question here.

Finally, the invalidity of the district court's holding, and the affirming opinion of the Sixth Circuit, is illustrated by the fact that the states have followed a variety of approaches with regard to whether, or to what extent, the occurrence of a database mismatch affects the validity of an individual's voter registration. Only a handful of states require a match as a prerequisite to registration. Some accept registrations from mismatched voters but require that they provide additional information, some specify that a mismatch is relevant only with respect to whether first-time voters who registered by mail must produce identification, and some do not provide for any consequence with respect to voter registration when a mismatch occurs. Levitt, Weiser & Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration* (2006), 16-17, *available at* http://tinyurl.com/66t6r8.[12] The holding below that Ohio must use data matching to test eligibility is erroneous.

III. THE REMOVAL OF OHIO VOTER REGISTRANTS FROM THE ROLLS BASED ON COMPUTER MATCHING VIOLATES HAVA AND THE NVRA

As noted above, HAVA restricts the authority of states to remove registrants from the voter rolls in order to ensure that eligible voters are not wrongly deleted. As applied to Ohio, HAVA specifically provides that voter removal must be

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[12] Since this report was issued, a number of states have further amended their practice with regard to the use of database matching. Cal. Code Regs., tit. 2, §§ 20108.38(e), 20108.65(e), 20108.71; Md. Regs. Code tit. 33, §§ 33.05.04.04(A)(3), (B)(3)-(4), 33.05.04.05(C)(5); N.C. Gen. Stat. § 163-166.12(b2); Alert Re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA), *available at* http://tinyurl.com/36o2lt (Pennsylvania); Election Advisory No. 2006-19, *at* http://tinyurl.com/2stlcp (Texas); Washington Ass'n of Churches, No. CV06-0726 (W.D. Wash. 2006) (stipulated final order and judgment), *available at* http://www.brennancenter.org/page/-/d/download_file_48236.pdf.

conducted "in accordance with the provisions of the National Voter Registration Act of 1993." 42 U.S.C. § 15483(a)(2)(A)(i).

The essence of the temporary restraining order is that Ohio should invalidate the voter registrations of certain Ohio residents for purposes of conducting the November 4 election, *i.e.*, those registrations which do not yield a computer match where the state is unable to affirmatively conclude that the mismatch was the result of computer database snafu. Depending on how the counties utilize the flawed data, certain registrants could be purged improperly and prohibited from voting in the November 4 election.

There is nothing in the National Voter Registration Act that permits the removal of registered voters from the registration list based on computer matching. 42 U.S.C. § 1973gg-6. Indeed, precisely to guard against disfranchisement through hasty removals of voters from registration lists, the NVRA requires that "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" must be completed at least 90 days prior to a federal election. 42 U.S.C. § 1973gg-6(c)(2)(A). *See Association of Community Organizations for Reform Now v. Ridge*, 1995 WL 136913, at *9 (Pennsylvania law permitting removal of voters' names up to 15 days before election violated NVRA). Accordingly, the relief ordered by the district court would place the state of Ohio in violation of HAVA and the NVRA.

When Congress adopted the NVRA, it recognized that it was imposing new requirements for removing names from registration lists on states that had not been

doing so. Congress saw that function as important, but it also did not want that function to interfere with the work of election officials preparing to conduct federal elections. Accordingly, it mandated that systematic checking of registration lists be completed 90 days prior to any federal election (except for the categories of criminal conviction, mental incapacity, death or request of the registrant). 42 U.S.C. §§ 1973gg—6(a) and (c). When Congress adopted HAVA, it expressly retained the NVRA protections against arbitrary removal of names from registration lists. 42 U.S.C. § 15545.

IV. THE TEMPORARY RESTRAINING ORDER COULD RESULT IN A SIGNIFICANT PERCENTAGE OF ELIGIBLE VOTERS BEING FORCED TO VOTE A PROVISIONAL BALLOT AND THUS INCREASE THE ATTENDANT CONSEQUENCES OF PROVISIONAL BALLOTING ISSUES

There are a number of practical consequences to the temporary restraining order. The Secretary points out in her motion the administrative difficulties and database incompatibilities. However, administrative inconvenience aside, there are also serious consequences for the voter and the public at large. The confusion created over how to handle mismatches will inevitably lead to an increased proportion of voters who are forced to cast a provisional ballot instead of a regular ballot. Such a ballooning of the percentage of overall Ohio voters relegated to the provisional rolls will increase the chances that those voters ballots will not be counted, make it highly unlikely that Ohio will have even unofficial election results in a timely manner, and increase the likelihood of once again catapulting election results into contested litigation.

The *en banc* Sixth Circuit was sharply divided on the consequences of reinstating the district court's order. Judge Sutton, writing for the majority, reached the conclusion that "[n]othing about this case or the relief plaintiffs seek will allow them to prevent a single voter from casting a ballot in the November election. At most, the relief could prompt an inquiry into the bona fides of an individual's registration, and *at most it could require an individual to cast a provisional ballot.* At that point, the validity of the voter's registration will be determined and, with it, the validity of his or her vote." 6th Cir. En Banc Op. at 9 (emphasis added). There is no basis in the record to support the court's holding that all voters will be able to resolve the lack of a data match in time to have their provisional ballots counts. What the court's holding means is that failure to resolve any matching problem will determine that the voter's ballot shall not count.

Provisional balloting was designed to be a fallback method of voting, a safety net. There is no question it is valuable. But it was not meant to bear the weight of a significant portion of overall voters. It was meant to be a solution, for example, for voters who have recently moved, Ohio Rev. Code § 3505.16, or who did not bring proof of identification, Ohio Rev. Code. § 3505.18.[13] As articulated *supra*, the statewide database was supposed to ease the incidence of voters being wrongly left off the rolls, and thus minimize the need for provisional voting, not to increase it due to software glitches.

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[13] A full list of circumstances in which an Ohio voter is eligible to cast an absentee ballot may be found at Ohio Revised Code § 3505.181(A).

The temporary restraining order affects over 600,000 Ohioans who registered and filed to vote since January 1, 2008, and 200,000 of whom for whatever reason encountered database mismatches. *See* "Fight Over Voter Registration Checks Hits U.S. Supreme Court; Rhetoric Intensifies", Gongwer, Volume #77, Report #201, Thurs., Oct. 16, 2008. The majority of the circuit court did not address the consequences of so significantly increasing the number of provisional voters

An increase in the percentage of voters forced to cast a provisional ballot would have a detrimental impact on voters and the public at large for four main reasons.

One, the state and county election system is not equipped to handle such a potentially high volume of provisional voters. Recent elections in Ohio have shown that the system has difficulty handling even the relatively small number of provisional voters in the course of a normal, non-presidential election. *E.g.*, Official election results from Ohio Secretary of State, http://www.sos.state.oh.us/SOS/elections/elec[illegible]sultsMain.aspx (last visited Oct. 16, 2008); *see also* From Registration to Recounts: The Election Ecosystem of Five Midwestern States, Steven F. Huefner, Daniel P. Tokaji & Edward B. Foley (2007) (located online at http://moritzlaw.osu.edu/electionlaw/joyce/index.php).

Two, it increases the potential that the votes of eligible voters will not be counted. Under Ohio law, some provisional ballots will be counted automatically when the local board of elections has verified that the voter is eligible to vote in that election. Ohio Rev. Code § 3505.181(B)(4). However, other provisional ballots

cannot only be counted if the voter appears at the board of elections within ten days after Election Day to provide additional information necessary to determine the voter's eligibility to vote. Ohio Rev. Code § 3505.181(B)(8). The lower courts gave absolutely no guidance – much less protection – for voters who cannot resolve public officials' inability to match two databases. So it may fall upon the poll worker, who may have received little if any training, to instruct the voter whether or not they need to follow up. And it requires the voter to decipher what, if anything, needs to be done and when. Such an unregulated result will not be easily or consistently navigated.

Three, it makes it far less likely that Ohio would be able to promptly report a relatively complete unofficial canvass of election results. In recent years, states have been under increasing pressure to produce election results quickly, if not almost immediately. That will be impossible if there is a significantly greater percentage of provisional ballots. As explained above, boards of election are required to investigate the eligibility of each provisional voter and, where required, hold a hearing or gather additional evidence of eligibility or identity. *See* Ohio Rev. Code § 3505.181(B). This will no doubt slow the compilation of results. If any given race ends of being close, the results could be delayed for some time while provisional ballots are investigated and processed.

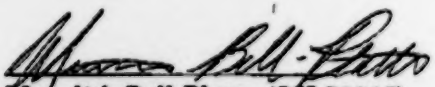
Four, it increases the likelihood that the election results themselves would be contested in court. If a race is close, and the number of provisional votes could be determinative of the result, that could lead to the counting or non-counting of those

ballots being used as a basis for challenging the final count. Again, this possibility for protracted litigation could delay official final results for some time. And it would be completely contrary to Congress's purpose when it enacted HAVA to prevent a repeat of the problems that plagued the 2000 Presidential election.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant the Secretary of State's application for an emergency stay.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JENNIFER BRUNNER, Secretary of State of Ohio, *Applicant*,

v.

OHIO REPUBLICAN PARTY, *et al.*, *Respondents*.

On Application for Stay from the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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No. 08A332

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JENNIFER BRUNNER, Secretary of State of Ohio, *Applicant*,

v.

OHIO REPUBLICAN PARTY, *et al.*, *Respondents*.

On Application for Stay from the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANT AND TO FORMAT BRIEF UNDER RULE 33.2 BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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MOTION TO FILE *AMICUS CURIAE* BRIEF AND TO FORMAT BRIEF UNDER RULE 33.2

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Service Employees International Union ("SEIU"), Ohio AFL-CIO, and District 1199, Health Care and Social Service Union, SEIU respectfully request leave to file the accompanying brief as *amici curiae* in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. Counsel for Applicant and Respondents have consented to the filing of this *amicus* brief.

Amici also respectfully seek leave to format this brief in accordance with Supreme Court Rule 33.2 rather than Supreme Court Rule 33.1 due to the urgency of the pending matter. The Secretary of State's motion was filed after business hours on October 15, 2008 and the temporary restraining order that the Secretary seeks to stay requires compliance by October 17, 2008. *Amici* are unable to prepare this brief in accordance with Rule 33.1 in time to permit this Court's consideration.

Amicus curiae the AFL-CIO is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

Amicus curiae the SEIU is an international union with 2 million members including tens of thousands in Ohio. SEIU engages in voter registration, education and other election-related activities within Ohio and throughout the rest of the country on behalf of its members.

Amicus curiae the Ohio AFL-CIO represents 1,600 local unions across Ohio from 48 different international unions. The local unions that comprise the Ohio AFL-CIO represent approximately 650,000 working men and women, and some 300,000 union retirees. The Ohio AFL-CIO works to bring economic and social justice to the workplace and to the lives of

working Ohioan men and women. To this end, the Ohio AFL-CIO engages in voter registration, education and other election-related activities.

Amicus curiae District 1199 is a local union affiliated with the Service Employees International Union. District 1199 represents approximately 28,000 health care and social service workers in Ohio, Kentucky, and West Virginia. District 1199's Constitution expressly provides that one of the organization's purposes is "to maintain, preserve and extend the democratic process and institutions of our country." District 1199 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members.

Amici represent members who have registered to vote in Ohio in the upcoming general election, and *Amici* have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed a separate *amicus* brief in this case in the Sixth Circuit, in support of the Secretary of State's request to stay the temporary restraining order at issue here, and an *amicus* brief in the District Court, in opposition to a separate request for a temporary restraining order.

For good cause shown, *Amici* respectfully submit that the Court should grant the motion for leave to file the amicus brief filed herewith, formatted according to Rule 33.2.

Dated: October 16, 2008

Respectfully submitted,

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INTEREST OF *AMICI CURIAE* [1]

Amicus curiae the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

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---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Amici represent members who have registered to vote in Ohio in the upcoming general election and have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed two *amicus* brief in this case, one in the U.S. District Court for the Southern District of Ohio and one in the U.S. Court of Appeals for the Sixth Circuit.

Counsel for *Amici* gave timely notice of intent to file this brief to Counsel of Record for Applicant and Sixth Circuit counsel for Respondents on October 16, 2008. Counsel for Applicant and Respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court should grant the Secretary of State's Application for a Stay of a Temporary Restraining Order because its precedent forecloses Plaintiffs from enforcing the statutory provision at issue via 42 U.S.C. §1983. Under this Court's authority, Congress' phrasing of the statutory provision at issue as imposing obligations upon government officials shows that the provision does not grant any individual rights, and the lower courts erred in focusing on the Congressional Act as a whole rather than the specific statutory provision at issue.

ARGUMENT

Amici curiae submit this brief in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. *Amici* write separately here to offer two additional reasons why this Court's precedent clearly forecloses reliance on Section 1983 to enforce the provision of the Help America Vote Act ("HAVA") at issue: first, because the provision at issue imposes obligations upon government officials rather than conveying any rights; and second, because the required inquiry focuses on the specific statutory provision at issue rather than the Congressional Act as a whole.

In this Court's precedent, the majority of the *en banc* U.S. Court of Appeals for the Sixth Circuit unsurprisingly could not bring itself to hold the statutory provision at issue enforceable via Section 1983, but instead sought to evade the applicable precedent by stating simply that the argument "raises a difficult issue" and that "[t]he 'close' answer to this question, together with the reality that all of the other risks of error support the plaintiffs, weigh in favor of denying the Secretary's motion to stay the TRO." *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008). But the issue is not difficult, and the answer is not close. There is no privately enforceable right here, and so no temporary restraining order should have issued.

1. As the Secretary of State has explained in her Application for a Stay of a Temporary Restraining Order, the HAVA provision at issue contains no rights-creating language; rather, at most, it imposes mandates upon state officials. That provision reads in full:

> Sharing information in databases. The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

42 U.S.C. §15483(a)(5)(B)(i).

This Court has made it clear that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted).[2] Thus, statutes that "have an aggregate focus" in that they "speak only in terms of institutional policy and practice" do not confer a right enforceable via Section 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (internal quotation marks omitted); *see also id.* (statutory "provisions

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[2] The inquiry to determine whether a statute confers enforceable rights is no different in an implied private right of action case (such as *Alexander*) than in a Section 1983 case. *See Gonzaga University v. Doe*, 536 U.S. 273, 283-285 (2002).

[at issue] further speak only in terms of institutional policy and practice, not individual instances of disclosure. . . . Therefore, as in *Blessing*, they have an aggregate focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights") (internal quotation marks and citations omitted); *Blessing v. Freestone*, 520 U.S. 329, 343 (1997) ("Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.") (empahses in original).

Here, there can be no question but that the statute at issue focuses on the persons regulated – "[t]he chief State election official and the official responsible for the State motor vehicle authority" – and requires them to enter an agreement. There is no mention of the individuals benefited by this statute, much less an unambiguous conveyance of rights to such individuals. That alone forecloses Plaintiffs' claim, and renders the grant of the temporary restraining order an abuse of discretion.

Surprisingly, the Sixth Circuit asserts that it is an open question whether "*Gonzaga* requires individual-rights-granting language even when there is no individual to whom such language could apply" because the class of persons benefited is as broad as all voters. *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 7 (6th Cir. Oct. 14, 2008). But this Court has made it clear that a private right may be implied only when the statute identifies "a class for whose *especial* benefit the statute was enacted." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (emphasis in original); *see also id.* at 294 ("Here, the statute states no more than a general proscription of certain activities; *it does not unmistakably focus on any particular class of beneficiaries* whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.") (emphasis added).

"[T]he question whether Congress . . . intended to create a private right of action is definitively answered in the negative where a statute by its terms grants no private rights *to any identifiable class*." *Gonzaga*, 536 U.S. at 283-284 (emphasis added; internal brackets and quotation marks omitted); *see also id.* at 285 (key question is "whether or not Congress intended to confer individual rights upon a *class* of beneficiaries") (emphasis added). The Sixth Circuit's proposal that statutes that benefit the public in general have a special claim to enforcement through Section 1983, while a statute that benefits an identifiable class would not, simply turns the inquiry established by this Court on its head, in defiance of precedent, logic, and common sense.

2. In the face of this clear precedent, the Sixth Circuit majority and the District Court proposed a different inquiry: not whether the statutory provision at issue conveys rights, but whether HAVA as a whole does so. *See Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008) (saying it would be "oddity" if Congress meant to permit private individuals to enforce provisional ballot sections of HAVA but not HAVA's "anti-fraud provisions"); *Ohio Republican Party et al. v. Brunner*, No. 2:08-CV-00913 at 7 (S.D. Ohio Oct. 9, 2008) (holding prior Sixth Circuit holding that HAVA's provisional ballot provision may be enforced through Section 1983 dispositive on question whether provision at issue may also be so enforced).

But this Court long ago foreclosed such an approach. In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court reversed a lower court's determination that Title IV-D of the Social Security Act creates an enforceable right. The decision explains that the lower court had "paint[ed] with too broad a brush" in holding Title IV-D created such rights "[w]ithout distinguishing among the numerous rights that might have been created by this federally funded

welfare program." *Id.* at 342. Instead, this Court instructed, courts must focus on the specific statutory provisions and rights at issue, as had been its approach in numerous prior cases:

> In *Wright*, for example, we held that tenants of public housing projects had a right to have their utility costs included within a rental payment that did not exceed 30 percent of their income. We did not ask whether the federal housing legislation generally gave rise to rights; rather, *we focused our analysis on a specific statutory provision* limiting "rent" to 30 percent of a tenant's income. Similarly, in *Wilder*, we held that health care providers had an enforceable right to reimbursement at "reasonable and adequate rates" *as required by a particular provision* in the Medicaid statute. . . . Finally, in *Livadas*, we discerned in the structure of the National Labor Relations Act (NLRA) the very specific right of employees "to complete the collective-bargaining process and agree to an arbitration clause." We did not simply ask whether the NLRA created unspecified "rights."

Blessing, 520 U.S. at 342-43 (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1990); *Livadas v. Bradshaw*, 512 U.S. 107 (1994)) (emphasis added; internal citations and parentheticals omitted). Here, similarly, this Court must decide whether 42 U.S.C. §15483(a)(5)(B)(i) – not HAVA as a whole – gives rise to enforceable rights. Plaintiffs and the lower courts offer no plausible reading of the language of that provision that would support such a determination.[3]

3. When, as here, the district court's reasoning so clearly contradicts the instruction of the Supreme Court, such error alone is sufficient reason to grant a stay. *See, e.g., Pacileo v. Walker*, 446 U.S. 1307, 1310 (Rehnquist, Circuit Justice 1980) (granting stay because "the [challenged] order . . . is very much at odds with principles set forth in [Supreme Court cases]").[4]

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[3] Because it is clear that the statutory provision at issue does not create an unambiguous right, there is no need to ask whether the existence of an alternative enforcement mechanism shows that Congress meant to preclude a remedy for the right at issue. *See Gonzaga Univ.*, 536 U.S. at 284-85 & n. 4.

[4] As the Secretary of State explained, the Plaintiffs' delay also weighs strongly against the grant of equitable relief. *See Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (setting forth elements of defense of laches). In addition to the Secretary of State's detailed explanation as to why the delay was unjustified, *Amici* point out that the Sixth Circuit's suggestion that Plaintiffs' delay in filing was attributable to efforts to resolve election disputes out of court not only finds no support in the record but also is belied by evidence that at no time did a representative of Plaintiff Republican Party contact the Secretary of State's office even to inquire about the State's

CONCLUSION

For the reasons discussed, the Secretary's Application for a Stay of a Temporary Restraining Order should be granted.

Dated: October 16, 2008

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methods for matching data under HAVA, even though HAVA was passed in 2002, the Secretary of State signed a memorandum of understanding with the state Bureau of Motor Vehicles regarding information sharing in 2004, and the manual on which Plaintiffs base their claims was released in January 2008. Farrell Affidavit (D.Ct. Dkt. Nos. 44-9, 44-10) ¶¶8, 10, Ex. A; Maragos Affidavit (D.Ct. Dkt. No. 44-1) ¶5.

By: Stephen P. Berzon

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